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In The

Supreme Court of the United States

October Term, 1994

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE NATIONAL MEDIATION BOARD HAS THE AUTHORITY UNDER THE RAILWAY LABOR ACT TO RECONSIDER ITS PREVIOUSLY-ISSUED CERTIFICATIONS AFTER CORPORATE CHANGES IN THE CARRIERS SUBJECT TO THE CERTIFICATIONS?

2. WHETHER THE COURT OF APPEALS APPLIED AN INCORRECT STANDARD IN ITS REVIEW OF THE BOARD'S PROCEDURES FOR IDENTIFYING AND RESOLVING REPRESENTATION DISPUTES ARISING FROM CARRIER MERGERS?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

The parties to the proceeding below are:

Plaintiffs – Railway Labor Executives' Association ("RLEA") and the following unincorporated national labor organizations: American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers (formerly American Train Dispatchers Association); Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees International Union; International Association of Machinists and Aerospace Workers ("IAM"); International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen & Oilers; International Longshoremen's Association; National Marine Engineers' Beneficial Association; Seafarers International Union of North America; Sheet Metal Workers' International Association; and Transport Workers Union of America.

Defendant – National Mediation Board ("NMB"). Intervenors-defendants – National Railway Labor Conference ("NRLC") and Burlington Northern Railroad Company ("BN").

Burlington Northern Inc., is the parent company of petitioner, Burlington Northern Railroad Company. The

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT – Continued

partially owned subsidiaries of petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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BURLINGTON NORTHERN RAILROAD COMPANY,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Burlington Northern Railroad Company ("BN") respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the *en banc* United States Court of Appeals for the District of Columbia Circuit entered in the above case on July 19, 1994, as amended on July 20, 1994.

OPINIONS BELOW

The opinion of the *en banc* United States Court of Appeals for the District of Columbia Circuit is reported: *Railway Labor Executives' Association v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994), as amended by unpublished order of July 20, 1994, and the opinion and order are set forth in the Appendix ("App.") at 1a - 63a. The orders of the United States District Court for the

District of Columbia are not reported but are set forth at App. 64a - 78a. The National Mediation Board's *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions, or Consolidations in the Railroad Industry* are reported as 17 N.M.B. 44 (1989) and are set forth at App. 79a - 93a. The Order of the Court of Appeals of the District of Columbia Circuit granting rehearing is set forth at App. 94a - 95a.

JURISDICTION

The judgment and opinion sought to be reviewed was entered by the *en banc* United States Court of Appeals for the District of Columbia Circuit on July 19, 1994. This Court granted BN's application for extension of time in which to file its Petition for Writ of Certiorari to and including November 16, 1994. This Court has jurisdiction to review the judgment of the District of Columbia Circuit under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 Ninth of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 Ninth states that:

> **Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections**
>
> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized

to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT OF THE CASE

This case concerns the authority of the National Mediation Board ("NMB" or "Board") to re-examine its previously-issued certifications in order to effectuate its longstanding carrier-wide representation policy. Under Section 2 Ninth of the RLA, 45 U.S.C. § 152 Ninth, the exclusive authority to resolve all representation disputes in the railroad and airline industries was vested in the NMB by Congress. In exercising such authority, the NMB has for over fifty years stated that its policy is to certify a single collective bargaining representative to represent a

specific craft or class of employees for the entire carrier. When the Board has responded to questions regarding the representative's continuing status on a particular carrier, it has consistently followed its carrier-wide representation policy.

More recently, the Board recognized that corporate mergers, consolidations and spin-offs were causing representation questions involving the certificates it had previously-issued and their impact on the Board's policy of carrier-wide representation. In those situations, questions concerning several entities holding NMB certificates for separate segments of a single craft or class within a single carrier were not being presented to the Board, and instead were causing collective bargaining confusion and creating the potential for interruptions of commerce.

Pursuant to Section 2 Ninth of the RLA, the Board adopted a policy to deal with those questions when they arose. The NMB's *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions, or Consolidations in the Railroad Industry*, 17 N.M.B. 44 (1989) (*"Railroad Merger Procedures"*); App. 79a - 93a, were thus designed to allow the Board to receive notice of carrier mergers and consolidations, so as to permit the Board to exercise its discretion to deal with the existing certificates and any representation questions that arose as a result of those transactions.

Petitioner is a carrier that gave notice to the Board of a set of mergers creating issues with respect to the Board's prior certifications and the Board's system-wide representation policy. In the case of BN, the Board was presented with 85 certificates which had previously been issued to predecessor railroads which had merged into the present-day BN. These certificates were held by labor organizations or subgroups of the organizations which claimed to represent less than the full system-wide craft or class on BN for collective bargaining purposes. The Board, after considering facts and arguments from the interested labor organizations, issued new certificates to

the single system-wide representative and to BN for each of the crafts or classes of BN employees. *In re Burlington N. R.R.*, 18 N.M.B. 240 (1991) ("*BN Merger Decision*").

Decisions such as the Board made with respect to BN's existing certificates implement an important policy of the Board and are not subject to judicial second-guessing. This Court has repeatedly found that there was no judicial review available for the Board's certification decisions or the Board's choices with respect to policy or procedures for ascertaining the identity of collective bargaining representatives. *See, e.g., Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) ("*Railway Clerks*"); *Switchmen's Union of N. Am. v. National Mediation Bd.*, 320 U.S. 297 (1943) ("*Switchmen's Union*").

Notwithstanding these decisions, the majority of the *en banc* Court of Appeals for the District of Columbia Circuit held that the NMB's policy for dealing with its prior certifications was subject to an expansive judicial review. 29 F.3d at 659; App. 5a.[1] The lower court further found the Board's *Railroad Merger Procedures* to be in violation of the RLA. *Id.*

The decision of the Court of Appeals for the District of Columbia Circuit has the effect of (1) significantly impeding the NMB's efforts to promote stable labor relations by carving out of the Board's jurisdiction representation disputes over its previously-issued certifications, and (2) establishing a new, more searching standard of review for NMB policy choices. There is also now serious doubt as to the status of the certificates and the collective bargaining agreements reached between the newly certified representatives and BN or the other railroads or airlines that have participated in this Board policy.

---

[1] Utilizing the extremely limited standard of judicial review, four dissenting judges would have allowed the Board's policy and procedures to stand. 29 F.3d at 673-81; App. 41a - 62a.

This case provides an opportunity for this Court to remove the newly created judicial impediment to the Board's implementation of policy for dealing with previously-issued certifications in mergers. This judicial roadblock was created out of whole cloth and was not intended by Congress. Rather, Congress intended the Board to have exclusive jurisdiction over **all** representation disputes. The Board has determined that a representation dispute requiring its intervention exists where multiple previously-issued certificates are being used to fragment a single craft or class within a merged carrier. There is no sound policy reason or judicial precedent which supports the lower court's restriction on the NMB's authority to resolve such questions over its previously-issued certificates and system-wide representation policy.

This Court should grant review to assure that the purpose of the RLA in "prompt and orderly settlement" of collective bargaining disputes, and the NMB's policy of system-wide representation, remain free from the judicial intrusion that would allow a return to the chaotic and fragmented labor relations created by multiple or conflicting previously-issued certifications.

FACTUAL BACKGROUND AND COURSE OF PROCEEDINGS BELOW

The NMB's authority to adopt its *Railroad Merger Procedures* is rooted in a statutory scheme that has always vested exclusive jurisdiction in the Board to identify and resolve representation disputes.

A. The NMB has Exclusive Authority over Merger-Related Representation Disputes.

Under the RLA, disputes as to the identity of the collective bargaining representative for a class or craft of a carrier's employees are representation disputes and are to be resolved exclusively by the NMB. 45 U.S.C. §§ 152

Third, Fourth, and Ninth; *General Comm. of Adjustment of the Bhd. of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323 (1943) (*"Missouri-Kansas-Texas"*). Once the NMB determines who shall be certified as the representative, the RLA commands the carrier to treat with the representative so certified and with "no other." *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 548 (1937) (*citing* 45 U.S.C. § 152 Ninth).

The term "representation dispute" is a "term of art," and "signifies that a question has arisen concerning who should be the employees' representative under the RLA." *Air Florida, Inc.*, 7 N.M.B. 162, 164 (1979). The term representation dispute "does not necessarily imply the existence of a contest between two or more potential representatives." *Id.*

When two or more carriers merge or consolidate their operations, it is nearly inevitable that a dispute will arise as to who should then represent the crafts or classes of employees on the merged system. Thus, courts have uniformly found that disputes as to the identity of the representative following the merger or consolidation of two or more carriers are representation disputes within the exclusive jurisdiction of the NMB. *See, e.g., Association of Flight Attendants v. Delta Air Lines, Inc.*, 879 F.2d 906, 912 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) (collecting cases from other circuits). In a recent opinion in chambers granting a stay, Justice O'Conner has similarly concluded that mergers in industries subject to the RLA result in representation disputes within the Board's exclusive jurisdiction. *Western Airlines, Inc. v. International Bhd. of Teamsters*, 480 U.S. 1301, 1305-06 (1987) (*"Western Airlines"*). These cases reflect both the practical reality that representation disputes arise when two or more carriers merge, and the judicial approval of NMB policy that such disputes are within the NMB's exclusive and plenary authority.

B. The Board has Determined that the Railway Labor Act Requires System-wide Crafts or Classes and Single Representatives.

Since its establishment, the NMB has determined that the RLA requires that the appropriate craft or class designation for representation purposes is one that covers the entire carrier or rail system. *New York Cent. R.R.*, 1 N.M.B. 197, 205 (1941), *later proceeding, Switchmen's Union of N. Am. v. National Mediation Bd.*, 320 U.S. 297 (1943). In that case, the Board determined that it had authority to establish a policy that a craft or class of a carrier's employees could not be split along geographical lines, *i.e.*, by yards, divisions, subsidiary roads, or companies, or regions of a parent operating company. The NMB articulated its policy as follows:

> [T]he Board is of the view that the idea of collective bargaining with a carrier denotes the collective participation of all the carrier's employees included in a single craft or class in its negotiations with the carrier by the method of representation. The word "collective" denotes singleness of agency in the same sense as the phrase "e pluribus unum" symbolizes the national unity of the States. It connotes not a part or parts of a subject but a collection of all the parts into one body, which applied in the case before us, means singleness of representation with a single carrier. On this point the Act seems literally definite as it reads:
>
> > The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of the Act.
>
> Note that the Act speaks of a majority of a craft or class determining "who shall be the representative" (not the representatives). The subjects "craft or class" and "representative" are both given in the singular number.

New York Cent. R.R., 1 N.M.B. at 209 (*quoting* Section 2 Fourth of the RLA, 45 U.S.C. 152 Fourth). Thus, based on a literal reading of the RLA as well as its understanding of the dynamics of bargaining, the Board articulated a policy that representation of employees is to be conducted by a single representative for the entire craft or class of a carrier's employees.

This policy, requiring a single representative for the system-wide craft or class, has consistently guided the NMB in the exercise of its authority under Section 2 Ninth. *See, e.g., Chicago & N. W. Ry.*, 4 N.M.B. 240, 249 (1965); *In re United Bhd. of Carpenters and Joiners of Am. (Ground Services, Inc.)*, 8 N.M.B. 112 (1980) ("Representation under the RLA is based upon system-wide crafts or classes of employees, and the Board has consistently held that it has no authority to fragment a craft or class on a carrier"); *In re International Ass'n of Machinists and Aerospace Workers AFL-CIO (Seaboard Coast Line)*, 8 N.M.B. 374, 382 (1981). This same authority and policy led the Board to eventually adopt its *Railroad Merger Procedures*. 17 N.M.B. at 46 (collecting cases); 81a - 82a.

C. Mergers in the Railroad Industry Lead to Uneven Representation and Confusion in Collective Bargaining.

In recent decades, as the railroad and airline industries proceeded through a series of mergers and consolidations, the Board faced a critical challenge to the continued implementation of its "system-wide representation" policy. Certificates previously-issued would cover separate and distinct groups of employees within a single craft or class of the merged carrier. In the railroad industry, the labor organizations or certificate holders would insist that the carrier follow the command of the certificates and bargain with each of the multiple representatives for less than the entire craft or class of the carrier's employees. *See American Train Dispatchers Ass'n v. Burlington N. R.R.*, 784 F. Supp. 899 (D.D.C. 1992) (The

United Transportation Union claimed that autonomous subgroups could divide the craft or class for collective bargaining purposes). In the airline industry, the carriers frequently chose to bargain with only one certified representative and ignored the rest. *See Trans World Airlines/ Ozark Airlines*, 14 N.M.B. 218, 233 (1987) (airline industry practice of independently deciding to recognize one labor organization over the other, notwithstanding that both organizations had certificates).

The resulting unstable labor relations led to chaotic collective bargaining and potential interruptions of commerce. The Board determined, as a matter of policy, that railroad and airline mergers caused "uneven representation, duplication of effort, and confusion" with respect to representation. *Republic Airlines*, 8 N.M.B. 49, 54-55 (1980). These post-merger bargaining schemes were directly at odds with the Board's well-developed policy requiring "singleness of representation" in collective bargaining.

A quintessential example of the "uneven representation" and collective bargaining "confusion" that resulted from the merger of two or more carriers is the representation mosaic that existed on BN. The present day BN is the product of a series of mergers from 1970 through 1985. *BN Merger Decision*, 18 N.M.B. at 246-47. On each predecessor railroad that was merged into or became a part of the unified BN, there was a certificate in the name of a labor organization and a carrier. After each merger, those certificates were not revised to reflect the changes in the carrier's corporate structure, and no certificate was ever issued under Section 2 Ninth to BN.

Thus, the prior certificates did not accurately reflect the carrier which was commanded to bargain, the appropriate craft or class, or the single labor organization which was to represent the entire craft or class on the BN system. Instead, a balkanized representation scheme developed as each putative certificate holder claimed to exclusively represent only those BN employees affiliated

with a now, non-existent predecessor railroad. As the number of railroads which merged into BN increased, the number of certificates increased as well. At the time BN notified the NMB, there were 85 certificates with the holders all parcelling the specific crafts or classes on BN into separate and autonomous fiefdoms. Collective bargaining jurisdiction was determined by the holders on the basis of previously-issued certificates and the territory of a non-existent predecessor railroad or some other limitation.[2]

Other examples of this balkanized representation and bargaining on BN were the following:

- Both the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU") claimed to represent segments of the craft or class of firemen on the basis of prior certificates that ran to extinct carriers; and
- The United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("UBJC") claimed to represent BN employees who were in the crafts and classes of engineer, trainmen, conductors, yardmen, and maintenance of way employees on a segment of BN track even though the BLE, UTU, and Brotherhood of Maintenance of Way Employees ("BMWE") also claimed, on the basis of prior certificates, to represent a majority of employees in each of those crafts and classes.

Obviously these situations created major difficulties in labor relations, as it was often impossible for BN to bargain within the purposes of the RLA with a particular craft or class without dealing with conflicting putative

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[2] When the Board eventually resolved the representation situation on BN it extinguished 85 representation certificates and issued in their place 15 certifications for the various system-wide crafts or classes of BN employees. *BN Merger Decision*, 18 N.M.B. at 256-61.

certificate holders and their carved up segment of a craft or class on BN. These particular difficulties and the problems experienced by other railroads led the Board to adopt the *Railroad Merger Procedures*.

D. The Board Adopted Merger Procedures to Promote Stable Labor Relations.

In order to preserve its policy of certifying only single representatives for the system-wide craft or class for collective bargaining purposes, the NMB resolved that it should address the fragmented pattern of representation that often resulted from mergers. The Board recognized that the absence of such procedures had severely limited the number and type of representation questions brought to the Board's attention. *In re Grand Trunk W. R.R.*, 17 N.M.B. 282 (1990), *later proceeding*, 19 N.M.B. 226 (1992).

Initially, the NMB decided that it would issue procedures to handle the investigation of representation disputes in airline mergers. *Trans World Airlines/Ozark Airlines*, 14 N.M.B. at 241-42.[3] Until the release of the new procedures, interim procedures were to be used for merger-related representation disputes. *Id.* These procedures explicitly referred to the problem of merging

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[3] That the Board would adopt such procedures is not unusual. A somewhat similar, though informal, procedure has been utilized by the Board when unions merge or when unions request that a certificate should be transferred to another union. *See Continental Airlines, Inc. and Air Micronesia*, 18 N.M.B. 40 (1990), *later proceeding, Continental Airlines, Inc. v. National Mediation Bd.*, 793 F. Supp. 330 (D.D.C. 1991), *aff'd without op.*, 957 F.2d 911 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 87 (1992); *In re Brotherhood of Ry., Airline & S.S. Clerks*, 7 N.M.B. 483 (1980). Also, the Board, on its own initiative, has developed policy and procedures to cover representation disputes arising on carriers which were not covered by the RLA and then become subject to it. *Air Florida, Inc.*, 7 N.M.B. at 167.

airline carriers deciding on their own the validity of Board-issued certificates. *Id.* Subsequently, the Board adopted final procedures for the airline industry. *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions, or Consolidations in the Airline Industry,* ("*Airline Merger Procedures*"), 14 N.M.B. 388 (1987).

Those procedures were challenged by the International Brotherhood of Teamsters ("IBT") when, after notification by USAir of its merger and an NMB investigation, the Board ordered an election to determine who would represent fleet service employees on the merged carrier. Judge Gesell dismissed the challenge after reviewing the well-developed law with respect to representation disputes arising from mergers and the extremely limited judicial review available to the court to consider the Board's action. *International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. National Mediation Bd. and USAir, Inc.*, CA No. 89-3240 (D.D.C. 1989), 1989 U.S. Dist. LEXIS 15045.

After finalizing its procedures for the airlines, the Board created interim procedures for the railroad industry in *Missouri Pacific Railroad (Union Pacific)*, 15 N.M.B. 95, 111-12 (1988). Shortly thereafter, the NMB issued its policy for resolving representation disputes arising out of railroad mergers. *Railroad Merger Procedures*, 17 N.M.B. 44 (1989); App. 79a - 93a.

In the *Railroad Merger Procedures*, the Board recognized that it was its "longstanding practice in keeping with the statutory mandates to certify only unions that represent the majority of a system-wide class of employees." *Railroad Merger Procedures*, 17 N.M.B. at 46; App. 81a. Additionally, the Board's *Railroad Merger Procedures* recognized that railroad mergers "often lead to significant changes in carriers' size, nature, management, workforce, and labor relations," and that such changes often will give rise to a representation dispute. *Id.* at 45; App. 81a. Those procedures provide that a carrier is to notify the Board of a "merger" and thereafter, the Board

will commence whatever action it deems appropriate under the circumstances. *Id.* at 50-51; App. 86a - 87a. In addition, the NMB will request information from carriers and labor organizations. *Id.* at 53; App. 89a. If the Board investigates, it will determine the status of its previously-issued certifications. *Id.* at 51; App. 87a. It may, if necessary, hold an election to determine who represents the entire craft or class on the merged carrier. *Id.* at 52; App. 89a. After it has investigated, the Board will issue new certificates, if necessary. *Id.* at 51; App. 87a.

E. The Board's Actions are Challenged in the Lower Courts.

Several labor organizations (hereinafter "Respondents" or "Unions") challenged the Board's authority to issue its procedures. District Judge Joyce H. Green granted motions by the Government and the intervenor-defendants for judgment on the pleadings and summary judgment, and dismissed the Unions' action on the grounds that, under *Switchmen's Union* and its progeny, it lacked jurisdiction to review the NMB's action. *Railway Labor Executives' Ass'n v. National Mediation Bd.*, CA No. 89-3306 (JHG) (June 10, 1991, and July 3, 1991); App. 64a - 74a. The *BN Merger Decision* was the subject of a second action filed by the Unions on May 16, 1991. That lawsuit was similarly dismissed based on the district court's belief that it lacked jurisdiction to review a Board's certification decision. *Railway Labor Executives' Ass'n v. National Mediation Bd.*, CA No. 91-1135 (JHG) (September 12, 1991); App. 75a - 78a.

The Unions' appeals of the two district court decisions were consolidated, and on March 9, 1993, a panel of the United States Court of Appeals for the District of Columbia, with Judge Williams dissenting, issued a decision reversing the district court's decisions. *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 988 F.2d 133

(D.C. Cir. 1993). On July 23, 1993, the entire Court issued its order granting *en banc* review and vacating the panel's decision of March 9, 1993. *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 996 F.2d 1271 (D.C. Cir. 1993).

By a 5-4 majority, the *en banc* court reversed the district court.[4] The majority stated that judicial review was available under *Leedom v. Kyne*, 358 U.S. 184 (1958), and that *Leedom's* application was not limited to violations of a "shall not" statutory command, but included actions in excess of the affirmative grant of authority in the RLA. 29 F.3d. at 662; App. 12a. The majority also joined in a concurrence finding the Board's procedures reviewable under the Administrative Procedures Act, 5 U.S.C. § 704 (1988) ("APA"). 29 F.3d at 659 n.1 and 673; App. 5a n.1, 39a - 41a.

The majority of the *en banc* court then proceeded to find a "gross violation of § 2 Ninth" of the RLA insofar as the NMB had established procedures whereby interested persons, including employees and carriers, could notify the Board of changes in a carrier's corporate structure so that the Board could decide, after receiving information and argument from the certificate holders, to investigate merger-related representation disputes. 29 F.3d at 659; App. 5a. The majority held that § 2 Ninth severely restricted the Board's authority. 29 F.3d at 666-67; App. 24a. According to the majority, the Board is prohibited from resolving representation disputes unless the Board's services are formally invoked by employees. 29 F.3d at 664-69; App. 18a - 31a. As to those representation disputes where, for whatever reason, the employees choose not to seek Board action, the majority's holding places

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[4] Three of the dissenting votes were apparently omitted from the initial slip opinion, but were reflected in an unpublished order dated July 20, 1994. App. at 63a.

those representation disputes outside of the Board's authority.[5]

In dissent, four judges argued that the extremely limited judicial review under *Switchmen's Union* and *Leedom* allowed the *Railroad Merger Procedures* to "easily pass muster." 29 F.3d at 674; App. 42a - 43a. The dissent reasoned that *Switchmen's Union* rested on both Congressional intent not to drag representation disputes into other tribunals, and to resolve explosive representation disputes quickly. 29 F.3d at 674-75; App. 44a - 45a. Extremely limited judicial review here was in accord with that Congressional intent. Indeed, the *Railroad Merger Procedures* sought "to deal efficiently with disputes before they escalate," and thereby effectuated that intent. 29 F.3d at 675; App. 45a.

Even under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the dissent noted, the Board's *Railroad Merger Procedures* would be upheld. In Section 2 Ninth, Congress had imposed a "duty" on the Board to act upon the request of employees, but it has said nothing about the "capacity" or discretion of the Board to investigate in other circumstances. 29 F.3d at 679; App. 55a. Because Congress had not directly spoken to the type of Board authority involved here, the Board's interpretation as expressed in the *Railroad Merger Procedures* was not unreasonable. 29 F.3d at 678; App. 53a. The dissent pointed out that "investigations and certifications . . . are incontestably what § 2 Ninth authorizes the Board to do." 29 F.3d at 678; App. 54a. The *Railroad Merger Procedures* "assert a power to investigate . . . whether the merged carriers operate . . . 'as a single transportation system' [so that there would be] a **single representative** for each 'craft or class'

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[5] Apparently unsure of its footing, the majority, without deciding, remanded the *BN Merger Decision* case to the district court for its reconsideration in light of its judgment here. 29 F.3d at 671; App. 36a.

within the system." 29 F.3d at 678 (emphasis in original); App. 54a. The dissent concluded by stating that there was no " 'clear and mandatory' barrier to the Board's efforts to assure that existing certifications do not turn into violations of the system-wide representation rule. . . . " 29 F.3d at 681; App. 62a.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should grant the Petition for Writ of Certiorari because the lower court has significantly limited NMB authority under the RLA and undermined the exclusive role that Congress gave the Board under § 2 Ninth of the RLA to resolve representation disputes. Further, the court of appeals has significantly altered the legal framework for judicial review of what had previously been virtually unreviewable Board policy and decisions.

There is an immediate and pressing need for issuance of the Writ because, without this Court's review, carriers such as BN will be forced to acknowledge the fragmented and balkanized scheme of collective bargaining which existed prior to the Board's issuance of the *Railroad Merger Procedures* and the *BN Merger Decision* at a very critical time. Railroads and labor organizations are beginning a new round of bargaining under a cloud of who is the system-wide representative of each of the railroad's crafts and classes. BN has also applied for merger approval from the Interstate Commerce Commission to merge with Santa Fe Pacific Corporation. *Burlington Northern Inc. and Burlington Northern Railroad Company – Control and Merger – Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company*, F.D. No. 32549 (merger application filed October 13, 1994). If approved, the merged rail carrier will face the same dilemma as to who is the system-wide collective bargaining representative for each of the merged carrier's crafts and classes. Finally, the Court should issue the Writ of

Certiorari because the decision below has created an apparent conflict among the circuit courts of appeal. Specifically, the Sixth Circuit recently held that a Board certification of the system-wide representative, which was issued pursuant to the *Railroad Merger Procedures*, presented a representation dispute within the Board's jurisdiction that was not subject to judicial review.

I. THE DECISION OF THE COURT BELOW SIGNIFICANTLY UNDERMINES THE NMB'S EXCLUSIVE AND PLENARY AUTHORITY TO RESOLVE ALL REPRESENTATION DISPUTES

The decision by the court below overturning the Board's *Railroad Merger Procedures* has a broad substantive impact: it prevents the Board from maintaining its longstanding policy of certifying a single representative for all employees within a single craft or class across an entire carrier or system. In the *Railroad Merger Procedures*, the Board recognized that, as a result of mergers and consolidations, certificates issued earlier on the premise that they applied system-wide now covered only a portion of a system of a railroad. Since the carrier was obligated to bargain with each organization or subgroup holding the certificate, despite its fractional constituency, the Board's own prior actions had become an instrument for thwarting, rather than fulfilling the NMB's policy of identifying a single system-wide representative.

The court of appeal's decision prevents the Board from rectifying these consequences of its own actions. Moreover, because the courts have uniformly dismissed any representative disputes arising as a result of carrier mergers, the decision of the court of appeals creates a dangerous vacuum in which no institution has any authority to act with respect to the previously-issued certificates – unless parties with an obvious self-interest in maintaining them initiate agency action.

Congress never intended to create this regulatory void. Under the RLA, all representation disputes are

within the exclusive jurisdiction of the NMB. 45 U.S.C. §§ 152 Third, Fourth, and Ninth. The long-standing rule, that Congress has committed to the NMB the exclusive and plenary authority for determining who shall be the representative of a carrier's employees, was first articulated by the Supreme Court in a trilogy of cases: *Switchmen's Union, supra; Missouri-Kansas-Texas, supra; General Comm. of Adjustment of the Bhd. of Locomotive Eng'rs v. Southern Pac. Co.*, 320 U.S. 338 (1943) (*"Southern Pacific"*). Even though the RLA does not explicitly give the Board the statutory authority to define the craft or class on a carrier, the *Switchmen's Union* Court held that Section 2 Ninth gave the Board the "power to resolve controversies" over who the representative is and "as an incident thereto to determine what is the appropriate craft or class. . . . " *Switchmen's Union*, 320 U.S. at 300-01.

The Court in the *Missouri-Kansas-Texas* and *Southern Pacific* cases went a step further, finding that the Board had authority to adjudicate a broad class of jurisdictional disputes, *i.e.*, disputes between two unions or disputes over the domains of crafts or classes of a carrier's employees. *Southern Pacific*, 320 U.S. at 343-44; *Missouri-Kansas-Texas*, 320 U.S. at 334-35. Even though neither union nor employees had requested certifications under Section 2 Ninth, the Court found Board authority, and thus the controversy was within the exclusive jurisdiction of the NMB. *Missouri-Kansas-Texas*, 320 U.S. at 336.

Following the trilogy and *Railway Clerks*, federal courts have consistently dismissed any cases that involve representation disputes arising from mergers or other corporate reorganizations among carriers. *See, e.g., Association of Flight Attendants v. Delta Air Lines, Inc.*, 879 F.2d at 912 (collecting cases); *Western Airlines, supra*. Notwithstanding these decisions, the majority of the lower court carved out of the NMB's sole and exclusive representation responsibility this category of representation disputes. According to the majority, only those representation disputes which arise when an employee

formally initiates a request for NMB investigation are within the NMB's § 2 Ninth jurisdiction. 29 F.3d at 664; App. 19a. The majority missed the mark with this very narrow view of NMB jurisdiction. Contrary to Congress' intent that "it fashioned an administrative remedy and left that group of disputes to the National Mediation Board," *Missouri-Kansas-Texas*, 320 U.S. at 337, the majority cast these representation disputes arising from mergers adrift, thus fostering a continued pattern of fragmented representation and bargaining that is contrary to the purposes of the RLA and specific Congressional intent that representational disputes be resolved promptly.

This Court should grant the Writ of Certiorari to reaffirm Congress' intent that the NMB has the exclusive authority over all disputes which arguably present a representation dispute as determined by the NMB.[6]

II. ISSUANCE OF THE WRIT IS NECESSARY TO AVOID A REGRESSION TO BALKANIZED COLLECTIVE BARGAINING IN THE RAILROAD INDUSTRY.

As discussed above, it is generally recognized that mergers bring about "significant changes in carriers' size, nature, management, workforce and labor relations." *Railroad Merger Procedures*, 17 N.M.B. at 45; App 81a. These changes can lead to unstable labor relations, confusion in collective bargaining and potential interruptions

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[6] In *Western Airlines, supra*, Justice O'Conner stated that it was "very likely that at least four Justices would vote to grant certiorari" to review an appellate court decision stating that an arbitration board, and not the NMB, had authority over a post-merger representation dispute concerning the effect of the merger on existing collective bargaining agreements. *Western Airlines*, 480 U.S. at 1306. The majority opinion of the en banc court here leaves to no forum the authority over a post-merger representation dispute.

to commerce. The Railway Labor Act was designed to avoid such instability and potential disruptions to commerce. 45 U.S.C. § 151a.

For example, BN has experienced these problems as a result of its mergers. The subgroups, or general committees, of the United Transportation Union, have utilized the previously-issued certificates directed at predecessor railroads to claim representation rights under Section 2 Ninth. This has led to hydra-headed collective bargaining subgroups, all claiming they have the autonomous right to serve and receive § 6 notices. 45 U.S.C. § 156. *See American Train Dispatchers Ass'n v. Burlington N. R.R.*, 784 F. Supp. 899 (D.D.C. 1992). The result is turmoil in the "prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions." 45 U.S.C. § 151a(4). *See, e.g., National Rail Strike: Hearings on H.J. Res. 222 Before the Subcomm. on Transp. and Hazardous Materials of H.R. Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 85 (1991) (President of United Transportation Union declares that only half of BN is involved in the dispute based on that labor organization's position that autonomous subgroups can undertake representation of only a portion of the craft or class).

The Court of Appeal's decision will have the effect of restoring the collective bargaining turmoil and balkanized labor relations that had previously existed on air and rail carriers, including BN. The Court of Appeal's decision creates doubt about collective bargaining between carriers, including BN and the newly certified representatives. For example, within weeks of the *BN Merger Decision*, certain unions refused to abide by the newly-issued certificate and instead contended that each separate subgroup or committee could represent, for collective bargaining purposes, distinct segments of a single craft or class. Although a district court has ordered the union to comply, that matter is pending on appeal. *American Train Dispatcher's Ass'n v. Burlington N. R.R.*, No.

91-1743 (JHP) (D.D.C. 1993), 1993 U.S. Dist. LEXIS 19963, *appeal pending*, No. 93-7225 (D.C. Cir.).

The majority's decision heralds a return to the confused labor relations on BN and casts a long shadow over the NMB's power to review its previously-issued certifications. Destabilization of both the air and rail carriers' labor relations will result from the decision below. The pre-*Railroad Merger Procedures* conduct of the industry will become the norm once again, leaving unresolved representation disputes, litigation, and the potential disruption of carrier operations in its wake.

This Court's review is especially important now that railroads are again merging and representation problems associated with those mergers will occur. The *BN Merger Decision* is not the only instance of merger-related representation problems needing the attention of the NMB. There have been other railroad mergers that have been addressed by the Board, as well as over 16 airline mergers, consolidations, or operating control cases investigated by the NMB. In all of these cases, certificates have been issued with the command that the rail or air carrier deal with the certified labor organization.

The majority's decision creates a Hobson's choice for the carriers and labor organizations: should the merged carrier honor the command and deal with the certified representative for the entire craft or does the merged carrier disregard the statutory command and deal with multiple putative representatives that represent only specific portions of the entire craft or class? Further, such a dilemma places considerable tension on past agreements reached between the merged carrier and certified representative. These dilemmas are not static because of present-day mergers and the potential for future ones. Union Pacific is presently seeking control of the Chicago & North Western Transportation Company, and BN is seeking approval to merge with the Santa Fe Pacific Corporation. Other rail merger negotiations are also noted to be ongoing. *See* "Norfolk Southern Corp is Discussing a

Possible Acquisition of Conrail Inc.," *Wall Street Journal*, Aug. 4, 1994, at A3, col. 2.

The majority's crabbed view of the NMB's representation jurisdiction would allow those representation problems in these situations to go unresolved, all of which leads to unstable labor relations, collective bargaining chaos, and divided representation of system-wide crafts or classes. Further, the inability of the NMB to resolve merger related representation disputes thwarts Congressional policy favoring mergers which are in the "public interest" because such mergers promote "economy and efficiency in interstate transportation. . . . " *Norfolk & W. R.R. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 132 (1991) (*citing Texas v. United States*, 292 U.S. 522, 534-35 (1934)). Obviously, carriers cannot achieve all of the economies and efficiencies of a merger if the carrier must conduct labor relations as if the merger never occurred.

Thus, the Writ of Certiorari should be granted to further Congressional policies which favor stable labor relations and economic and efficient transportation services for the public.

III. THE MAJORITY'S DECISION CREATES AN APPARENT CONFLICT AMONG THE CIRCUITS.

The five judge majority in the court below found that there could be no representation dispute subject to the Board's jurisdiction unless the employees formally invoked the Board's services. 29 F.3d at 664; App. 19a. The court of appeals reasoned that because only employees could invoke the Board's services, that the Board's policy decisions to exercise authority in other instances were, under a more searching standard of review, violative of the RLA. *Id.* This holding by the Court of Appeals for the D.C. Circuit is at odds with the decision of the Sixth Circuit Court of Appeals in *Brotherhood of Maintenance of Way Employees v. Grand Trunk Western Railroad*, 961 F.2d 1245 (6th Cir. 1992) ("*Grand Trunk*").

In the *Grand Trunk*, the carrier, Grand Trunk Western Railroad ("GTW"), had invoked the Board's services pursuant to the *Railroad Merger Procedures*.[7] The Board issued a decision which held that there should be system-wide representatives for the various crafts or classes of employees on GTW. *In re Grand Trunk W. R.R.*, 17 N.M.B. at 304-05. Accordingly, the Board extinguished previously-issued representation certificates which had been in the name of the predecessor railroads. Thereafter, the unions sought a declaratory judgment that GTW had violated the RLA by failing to bargain with the representatives who had been previously certified to represent employees on the non-existent, merged railroads. *Grand Trunk*, 961 F.2d at 1247. After the district court exercised jurisdiction and found that GTW had violated the RLA, GTW appealed.

The Court of Appeals for the Sixth Circuit indicated that a "proper procedure was for the parties, or at least one of them to return to the NMB. . . . " to have the matter resolved. *Grand Trunk*, 961 F.2d at 1248. Noting that GTW had requested the NMB to clarify its decision and that the NMB had heard arguments on the clarification request, the court delayed issuance of its opinion until after the NMB issued is clarification. *Id.* at 1249. The Board clarification stated that the dispute between the unions and GTW was a representation despite. 19 N.M.B. 226, 229.

The court, after reviewing the applicable case law, held that the dispute over whether GTW was required to bargain with the representatives from the non-existent,

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[7] The Grand Trunk Western Railroad had previously merged with the Detroit, Toledo & Ironton Railroad and the Detroit & Toledo Shore Line Railroad. These mergers resulted in the single crafts or classes of employees being represented by several different previously-issued certificate holders. 17 N.M.B. at 290-93.

merged railroads was a representation dispute under Section 2 Ninth of the RLA. *Grand Trunk*, 961 F.2d at 1248-49. That is, a representation dispute could exist despite the fact that the employees had not brought the dispute before the Board. *Id.* at 1246. The court went on to hold that because the dispute was a representation dispute, under *Switchmen's Union*, there was no jurisdiction to either interpret or review the Board's decision. 961 F.2d at 1250.

BN submits that the decision of the five person majority of the Court of Appeals for the District of Columbia Circuit is in conflict with the decision in *Grand Trunk*. This Court should grant review of the lower court's decision to redress this conflict among the circuits and definitively state that the NMB has exclusive and plenary jurisdiction over all disputes where "defining the bargaining unit and determining the representative for collective bargaining " is at issue as a result of commercial transactions that change the carrier's corporate structure and throw in doubt the Board's previously-issued certificate. *Western Airlines*, 480 U.S. at 1302-3.

IV. REVIEW BY THIS COURT IS NECESSARY TO PREVENT JUDICIAL INTERFERENCE WITH ESTABLISHMENT OF PROCEDURES BY THE BOARD.

Review by this Court is needed to delineate the appropriate role of the courts with regard to procedures established by the National Mediation Board for identifying representation disputes. BN submits that the sharply conflicting opinions in the court below demonstrate confusion as to the applicable standards of judicial review. Moreover, the results reached by the majority constitute undue judicial interference with the Board's procedures and jeopardize the Board's ability to perform the functions entrusted to it.

This Court long ago recognized the unique role of the National Mediation Board in resolving representation disputes and laid down the rule that the federal courts should not oversee the Board in its exercise of that function. *Switchmen's Union*, 320 U.S. at 304-06; *Missouri-Kansas-Texas*, 320 U.S. at 334-35. The essential underpinning of these cases – that Congress intended to preclude judicial interference with the Board's resolution of certification disputes – was recognized in the legislative history of the APA and in cases decided since its enactment. *Attorney General's Manual on the Administrative Procedures Act* 94 (1947); *Railway Clerks, supra*. This Court has recognized only one exception to that principle, for a situation in which an agency has concededly violated a specific prohibition of the statute in derogation of the individual rights of a group of employees. *Leedom v. Kyne*, 358 U.S. at 184; *See Railway Clerks*, 380 U.S. at 659-60. Under this precedent, the standard for judicial review of Board certification decisions is clearly "the narrowest known to law." *Professional Cabin Crew Ass'n v. National Mediation Bd.*, 872 F.2d 456, 459 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989).

The majority below, however, resisted the application of this precedent because, it reasoned, the *Railroad Merger Procedures* involved a rule-making rather than a certification: "It is difficult to conclude that the Supreme Court intended to insulate from review every action of the Board which arguably involves a question of representation, including those (like the one at bar) that bear absolutely no relationship to 'find[ing] the fact' of who employees desire as their representative." 29 F.3d at 663 (*quoting Switchmen's Union*, 320 U.S. at 305); App. 14a. The concurrence made the same point.

However, in finding the Board's procedural rules reviewable, these judges missed a more important point – that the Board possessed extremely broad flexibility in structuring its procedures. In the absence of a constitutional violation or a violation of a specific prohibition of

the RLA, judicial interference with the Board's procedures was wholly improper. Review by this Court is necessary to reaffirm that the Board should be permitted to create its own procedures for identifying and resolving representations disputes without intrusion by the judiciary.

The RLA itself is in large part silent as to what procedures the Board is to employ in making its decisions. In light of Congress' intent to minimize judicial interference with the Board, this Court from the outset interpreted the lack of specificity as an indication of the Board's broad discretion in establishing procedures. In *Railway Clerks*, this Court considered some of the procedures that the NMB had employed to determine the craft or class on a carrier and the Board's choice of a ballot to be used for the election of the representative. This Court stated that Congress left to the Board "the task of selecting the methods and procedures which it should employ in each case." *Railway Clerks*, 380 U.S. at 662.

This discretion extended to determining the level of assistance required from the carrier in identifying and resolving representation disputes. Thus, in *Railway Clerks*, the Court ruled that a carrier "is not entitled to be a party to proceedings by which the Board determines the scope of the appropriate craft orders," but also held that the degree to which a carrier is allowed to become involved in the investigation of representation disputes is a matter completely within the Board's discretion. *Id.* at 654, 666-67. To that end, the Court wrote:

> Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board.

380 U.S. at 666-67.

The *Railroad Merger Procedures* perform this role. On their face, they require rail carriers to notify the Board of any mergers at the same time and with the same form that they file with the Interstate Commerce Commission.

Railroad Merger Procedures, 17 N.M.B. at 50; App. 89a. They also permit the carriers to inquire as to the post-merger status of any NMB certifications previously-issued. *Id.* at 53-54; App. 90a. However, they do not give carriers any right to any investigation, but make that a matter for the Board's discretion. *See id.* at 51; App. 87a.

Insofar as the *Railroad Merger Procedures* delineate this role for carriers, they are well within the Board's established authority. The Board clearly has authority to establish the ground rules for carrier participation and to require the submission of carrier documents for inspection. 45 U.S.C. § 152 Ninth ("The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph").

Of course, the *Railroad Merger Procedures* also contemplate that the Board will in appropriate cases proceed with an investigation and issue a decision clarifying the status of the existing certificates. In such cases, however, the Board is always taking action with respect to certificates previously-issued by the Board in proceedings where no doubt as to its jurisdiction existed. Nothing in § 2 Ninth precludes the Board from terminating certificates that have become moot with the passage of time. Since Congress has not spoken to this issue, it appears entirely appropriate for an exercise of the agency's rule-making powers. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 837.

Moreover, the Board acts in a particular case only upon the basis of the information submitted in the course of its investigation – information which may indicate the existence of a representation dispute. For example, in the *BN Merger Decision*, the Board requested information from the labor organizations and then determined whether there were disputes within its jurisdiction. *BN Merger Decision*, 18 N.M.B. at 243, 260-61. It issued new certificates on a system-wide basis where it was clear that

a single organization represented an entire craft, but called for an election where it appeared that two entities each had a claim to representation. *Id.* These are precisely the type of certification decisions that receive the full *Switchmen's Union* deference.

In sum, guidance is needed from this Court as to the standard of review applicable to procedural rules adopted by the NMB. The majority failed to apply the clear direction of this Court to the *Railroad Merger Procedures* insofar as they dealt with Board authority over previously-issued certificates based on information provided to the Board. At the same time, the majority decided what authority the Board possessed to deal with the consequences of that information, regardless of whether that information, submitted by carriers and labor organizations alike, may have demonstrated the existence of one or more representation disputes. This overly aggressive approach to judicial review requires full scrutiny by this Court.

Through the creation of a lesser standard of judicial review, the majority has now required the Board to accept certificates that foster a fragmented bargaining scheme in opposition to its system-wide representation policy. The majority has also opened the floodgates for unions and carriers to seek judicial review of NMB decisions and policy determinations. The majority's holding stands *Railway Clerks* on its head and, if applied in future cases, will bring about precisely the situation Congress sought to avoid by enacting § 2 Ninth: the involvement of the federal judiciary in representation matters involving railroad and airline carriers and unnecessary delay in determining the representative of the system-wide craft or class. *Railway Clerks*, 380 U.S. at 671.

This Court should grant the Writ of Certiorari to reaffirm its formulation of the standard for judicial review of Board policy and procedures and reject the majority's more searching standard of judicial review.

CONCLUSION

For the reasons shown above, a writ of certiorari should issue and the judgment and decision of the en banc United States Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 9, 1994 Decided July 19, 1994

Nos. 91-5223 & 91-5310

RAILWAY LABOR EXECUTIVES' ASSOCIATION; AMERICAN RAILWAY AND AIRWAY SUPERVISORS' ASSOCIATION; AMERICAN TRAIN DISPATCHERS ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD RAILWAY CARMEN; HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

UNION OF AMERICA; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; UNITED TRANSPORTATION UNION,

APPELLANTS

v.

NATIONAL MEDIATION BOARD,

APPELLEE

BURLINGTON NORTHERN RAILROAD COMPANY; NATIONAL RAILWAY LABOR CONFERENCE,

INTERVENOR DEFENDANT – APPELLEES

Appeal from the United States District Court
for the District of Columbia

(No. 89-cv03306)

John O'B. Clarke, Jr. argued the cause for appellants. With him on the briefs was *L. Pat Wynns. William Grattan Mahoney* entered an appearance.

Edward T. Swaine, Attorney, United States Department of Justice, argued the cause for appellee National Mediation Board. With him on the brief were *Frank W. Hunger,* Assistant Attorney General, United States Department of Justice, *Eric H. Holder, Jr.,* United States Attorney, *Barbara C. Biddle,* Attorney, United States Department of Justice, *Ronald M. Etters,* General Counsel, National Mediation Board. On the brief for appellee National Railway Labor Conference were *Richard T. Conway, Ralph J. Moore, Jr.* and *D. Eugenia Langan.*

Thomas J. Knapp argued the cause for intervenor Burlington Northern Railroad Company. With him on the brief were *Lawrence M. Stroik, Charles W. Shewmake* and *Odesa L. Gorman-Stapleton.*

On the brief for *amici curiae* Airline Industrial Relations Conference and Regional Airline Association were *Robert J. DeLucia, Harry A. Rissetto, Thomas E. Reinert, Jr.* and *Walter Coleman.*

Before: MIKVA, *Chief Judge,* WALD, EDWARDS, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* WILLIAMS.

EDWARDS, *Circuit Judge:* Under Section 2, Ninth of the Railway Labor Act ("RLA" or "Act"), the National Mediation Board ("NMB" or "Board") is given very limited authority to investigate representation disputes "among a carrier's employees." *See* 45 U.S.C. § 152 Ninth (1988). Such investigation is initiated only "upon request of either party to the dispute," and it is clear that a carrier is not a "party" under Section 2, Ninth. *Id.* Following investigation, the Board certifies "to both parties," and "to the carrier," the employees' designated bargaining agent. *Id.* Nothing in this statutory provision authorizes the Board to investigate or resolve a representation dispute either *sua sponte* or pursuant to a petition from a carrier; and for more than fifty years following the enactment of the RLA, the Board acted to address representation disputes *only* when it received requests from or on behalf of employees.

Despite the absence of any statutory authority, the Board announced in 1989 that carriers, as well as the Board itself, could initiate representation proceedings in the wake of railroad mergers and acquisitions, on the theory that such events were likely to precipitate uncertainty as to the proper representation of employees. *See Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry*, 17 N.M.B. 44 (1989) ("Merger Procedures"). Appellants, a coalition of unions representing railroad employees, challenged the Merger Procedures as an illegal arrogation of authority not conferred by the Act. The District Court dismissed appellants' suit as unreviewable under *Switchmen's Union of North America v. NMB*, 320 U.S. 297 (1943). On appeal, in an opinion by then-Judge Ruth B. Ginsburg, a divided panel of this court reversed, holding that judicial review was available and that the Board had exceeded its statutory authority. *See Railway Labor Executives' Ass'n v. NMB*, 988 F.2d 133 (D.C. Cir. 1993). Having accepted the Board's suggestion for rehearing *en banc*, we again reverse.

The Supreme Court has made clear both that the Board's authority under Section 2, Ninth is "exclusive" only *"[i]f* the present dispute falls within § 2, Ninth," *General Comm. of Adjustment v. Missouri-Kan.-Tex. R.R.*, 320 U.S. 323, 336 (1943) (emphasis added), and that the Board's role under Section 2, Ninth is very narrow. *See Switchmen's*, 320 U.S. at 304, 305. The Board does not even claim that the terms of Section 2, Ninth support the authority that it asserts, and it can point to no other provision in the RLA giving it the authority to promulgate the Merger Procedures. Instead, the Board would

have us *presume* a delegation of power from Congress absent an express *withholding* of such power. This comes close to saying that the Board has the power to do whatever it pleases merely by virtue of its existence, a suggestion that we view to be incredible. Because we find that the Board's attempt to expand its jurisdiction has no basis whatsoever in the language of the statute or its legislative history, and because the Board's novel claim of authority is belied by longstanding agency practice, we hold that the Merger Procedures constitute a "gross violation" of Section 2, Ninth.[1]

Judicial review is available because the challenged action constitutes a "gross violation" of the Act. Having found such a violation, it is clear that appellants must prevail on the merits. Accordingly, we reverse the judgment of the District Court dismissing appellants' complaint; we remand case number 91-5223 for entry of declaratory and injunctive relief in appellants' favor; and we remand case number 91-5310 for reconsideration in light of the new judgment in case number 91-5223.

I. Background

Enacted in 1926, the RLA is a comprehensive statute governing labor relations in the railroad and airline industries. In 1934, Congress amended the Act to create

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[1] The separate concurring opinion by Judge Randolph holds that judicial review also is available to the appellants under section 704 of the Administrative Procedure Act, *see* 5 U.S.C. § 704 (1988), and that the Merger Procedures cannot withstand review for lack of authority in the Board to promulgate them. We agree with this alternative basis for decision.

the National Mediation Board, a three-member agency whose primary function is to mediate labor disputes among employees and carriers covered by the RLA. *See* 45 U.S.C. § 154 (1988). Section 2, Ninth of the Act also endows the Board with limited jurisdiction to investigate representation disputes among employees "upon request of either party to the dispute," and, following such investigation, to certify to the parties and to the carrier the identity of the designated bargaining representative. *Id.* at § 152 Ninth.

For more than fifty years following its creation, the Board unvaryingly conducted representation investigations only at the behest of employees or their representatives. In 1987, however, with no direction from Congress, the Board decided that existing procedures under Section 2, Ninth were "inadequate to provide for a fair and orderly resolution of representation matters put into flux by a merger." *Trans World Airlines/Ozark Airlines,* 14 N.M.B. 218, 241 (1987). The Board announced its intention to promulgate revised procedures with prospective application for handling representation disputes sparked by mergers, acquisitions and consolidations, and it set forth immediately effective interim procedures which permitted carriers to invoke the Board's jurisdiction in those cases. *See id.* at 241-42; *see also Missouri Pacific Railroad (Union Pacific),* 15 N.M.B. 95-111 (1988) (clarifying that *Trans World Airlines/Ozark Airlines* "interim procedures were meant to apply to the railroad industry as well as the airline industry"). Thereafter, the Board sought comment from carriers and labor organizations on a draft of the merger procedures, and, in November 1989, issued them in final form.

The Board purported to rest promulgation of the Merger Procedures on "established authority under Section 2, Ninth of the Railway Labor Act." 17 N.M.B. at 44. The Board cited no specific language in the statute to support this assertion. Rather, recognizing that mergers[2] may lead to changes in craft or class designations and may result in multiple certifications for the same craft or class of employees, the NMB concluded that expanded investigatory procedures were appropriate in order to further the Board's purported mandate of certifying only unions which represent the "majority of a system-wide class of employees." *See id.* at 46. Accordingly, the Merger Procedures seek to require carriers to inform the NMB in writing of intent to merge, after which the Board will conduct an investigation to resolve "the status of the certifications on the merged carrier." *Id.* at 51.

The Merger Procedures also contemplate that the Board *sua sponte* may investigate the status of post-merger certifications. Thus, for example, the Procedures state that it is "the affirmative responsibility of the Board" under the Act to determine the status of its prior certifications. *Id.* at 47; *see also id.* at 49 (asserting that the Board retains "flexibility to appropriately investigate and apply its procedures to different situations which may arise in the future"). Moreover, at no time in this litigation has the Board disavowed the appellants' claim that

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[2] The Merger Procedures define "merger" broadly to include any "consolidation, merger, purchase, lease, operating contract, acquisition of control or similar transactions." Merger Procedures, 17 N.M.B. at 50.

the Procedures seek to empower the Board to investigate a carrier's representation status on its own initiative.

Following the issuance of the Merger Procedures, the Railway Labor Executives' Association and eighteen other rail labor unions (collectively, "RLEA") filed this suit in the District Court. RLEA sought both a declaratory judgment that the Board lacked statutory authority to promulgate the Merger Procedures and a permanent injunction against their enforcement. The District Court, relying on *Switchmen's*, dismissed RLEA's complaint on the ground that the adoption of the Merger Procedures fell "within the unreviewable discretion of the NMB." *Railway Labor Executives' Ass'n v. NMB*, No. 89-3306, at 7 (D.D.C. June 10, 1991) (memorandum opinion).[3] A panel majority of this court reversed, concluding that Section 2, Ninth "does not bear the new construction the Board has placed upon it." *Railway Labor Executives' Ass'n v. NMB*, 988 F.2d at 134. The panel majority held that judicial review was not foreclosed by *Switchmen's* or *Leedom v. Kyne*, 358 U.S. 184 (1958), because the Merger Procedures

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[3] RLEA also brought a second suit in the District Court, challenging the Board's application of the Merger Procedures. In that case, the Board, at the request of Burlington Northern Railroad Co. ("Burlington"), had investigated the effect of various mergers and consolidations, mostly dating back to the 1970s, on employee representation certifications. The Board investigated over eighty certifications, issuing some new ones and terminating others. *See In re Merger of Northern Pacific Ry.*, 18 N.M.B. 240 (1991). The District Court also dismissed this suit for want of authority to review the Board's actions. *See Railway Labor Executives' Assn v. NMB*, No. 91-1135 (D.D.C. Sept. 12, 1991) (order). The Burlington case was consolidated with this one on appeal before the panel as well as the *en banc* court.

constituted a wrongful arrogation of power by the Board in "gross violation" of the RLA. 988 F.2d at 134. The full court thereafter granted the Board's suggestion for rehearing *en banc*.

On appeal, RLEA argues that the plain text and legislative history of Section 2, Ninth compel the conclusion that the Board may not investigate a representation dispute except upon request of the employees involved in the dispute. Because the Merger Procedures seek to authorize representation proceedings at the initiation of the Board or carriers, RLEA contends that the Procedures represent a gross violation of the RLA which may be reviewed by this court. In defense, the Board claims, first, that under *Switchmen's*, this court is powerless to review the Merger Procedures, and, second, that the Merger Procedures are a permissible interpretation of Section 2, Ninth to which this court owes deference. The Board's support for the latter argument consists largely of the contention that because Section 2, Ninth does not expressly *bar* the agency from investigating representation disputes in circumstances other than those enumerated, the Board is free to do so. As we explain, our reading of the text and legislative history of Section 2, Ninth accords with that of appellants, and we therefore reverse the judgment of the District Court.

II. ANALYSIS

A. Reviewability of Board Actions Under Section 2, Ninth

1. The General Legal Framework

In *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930), and *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), the Supreme Court established that if the absence of jurisdiction of the federal courts would result in a sacrifice or obliteration of a right that Congress created under the RLA, there would be a compelling inference that the general jurisdiction of the federal courts provides a basis for review. *See also Switchmen's*, 320 U.S. at 300. Thus, when a statutory command is "explicit and unequivocal," or when Congress has "codifi[ed] . . . rules governing . . . controversies" or stated "the various principles of agency which were to govern the solution of disputes" under Section 2, Ninth, the federal courts have jurisdiction to enforce the congressional command. *General Comm. of Adjustment*, 320 U.S. at 335.

The Supreme Court was concerned, however, that if general federal jurisdiction were left fully open, the federal courts might unduly interfere with the work of the Board in routine cases involving a mere "application of the principles of collective bargaining and majority rule." *Id.* at 334. Thus, in *Switchmen's*, the Court held that the Board's certification of representatives pursuant to Section 2, Ninth was a function committed exclusively to the NMB and was not judicially reviewable. The Board's role was to "find the fact [of representation] and then cease," and the Court found "plain" congressional intent that

"the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Switchmen's*, 320 U.S. at 305.

Switchmen's has not been taken to mean, however, that all Board actions which fall within Section 2, Ninth's compass are immunized from judicial review. To the contrary, in accordance with the principles enunciated in *Leedom v. Kyne*, which relied in part on *Switchmen's*, federal courts have jurisdiction to review "action[s] taken in excess of delegated powers." *Leedom v. Kyne*, 358 U.S. at 190. In *Leedom v. Kyne*, the Supreme Court held that the district court had jurisdiction to set aside a certification of the National Labor Relations Board ("NLRB") where that agency had refused to poll professional employees before combining them in a bargaining unit with non-professional employees. Rejecting the NLRB's claim that the National Labor Relations Act ("NLRA") foreclosed review, the Court found jurisdiction to review because the NLRB had acted "in excess of its delegated powers and contrary to a specific prohibition in the [NLRA]." *Id.* at 188. Section 9(b)(1) of that statute, which provides that the NLRB "shall not" certify a bargaining unit comprising both professional and non-professional employees "unless a majority of such professional employees vote for inclusion" in the unit, *id.* at 185 (quoting NLRA), was "clear and mandatory," and its violation was subject to judicial review. *Id.* at 188. The Court said that it "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190.

Although *Leedom v. Kyne* itself dealt with a "shall not" statutory command, its application is not so narrowly limited. As we reasoned in *Miami Newspaper Printing Pressmen's Union Local 46 v. McCulloch*, 322 F.2d 993, 997 (D.C. Cir. 1963) (McGowan, J.), an agency (in that case, the NLRB) could as well exceed its delegated powers by failing to adhere to a specific affirmative command. Thus, we were "unable to read the Court's decision in *Leedom v. Kyne* as limited to the negatively worded prohibition there involved." *See id.* The Supreme Court implicitly approved this reasoning in *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 661 (1965) ["*Railway Clerks*"], which held that NMB action was reviewable to the extent of insuring that the Board had complied with its affirmative statutory duty to investigate representation disputes. *See also Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 496 (D.C. Cir. 1980) (*en banc*) (agency must violate a specific command), *cert. denied*, 450 U.S. 917 (1981). Thus, it is of no moment that Section 2, Ninth does not state that "the Board shall not conduct an investigation except on the request of an employee," so long as we may conclude (as we do) that Section 2, Ninth imposes a clear and mandatory obligation upon the NMB to investigate representation disputes *only* at the behest of the affected employees. We reject any suggestion in our prior cases that it remains open to question whether *Leedom v. Kyne* applies only to negative commands.

In establishing a framework for review pursuant to *Switchmen's* and *Leedom v. Kyne*, recent decisions of the circuit have suggested that "[j]udicial review of NMB

decisions is one of the narrowest known to the law," and have held that the "courts have no authority to review NMB certification decisions in the absence of . . . a gross violation of the Railway Labor Act." *International Ass'n of Machinists v. Trans World Airlines, Inc.*, 839 F.2d 809, 811 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 820 (1988); *see also Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 459 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989) (same effect). But these decisions have been premised, as was *Switchmen's*, on the assumption that the action of the Board fell within the compass of authority delimited by Section 2, Ninth. That is not the case here, for not only do the Merger Procedures constitute a "gross violation" of the Act, but the Board has no threshold jurisdiction to act at all in the absence of a request from the employees involved in a representation dispute.

Thus, our prior cases do not tell the whole story. The nonreviewability rule announced in *Switchmen's* always must be understood in light of the very circumscribed role the Board was thought to play under Section 2, Ninth. As the Supreme Court explained:

> The Mediation Board makes no 'order.' And its only ultimate finding of fact is the certificate. The function of the Board under § 2, Ninth is more *the function of a referee.* To this decision of the referee Congress has added a command enforcible by judicial decree. But the 'command' is that 'of the statute, not of the Board.'

Id. at 304 (citations omitted; emphasis added). The Court continued:

> Under this Act Congress did not give the Board discretion to take or withhold action, to grant or

> deny relief. It gave it no enforcement functions. It was to find the fact and then cease. Congress prescribed the command.

Id. at 305. These passages demonstrate that the Board has no freewheeling authority to act as it sees fit with respect to anything denoted a "representation dispute." The Board's authority is exclusive only with respect to the precise matters delimited by Section 2, Ninth. If employees have not sought an "investigation" under Section 2, Ninth, none can be initiated because the statute limits action to cases initiated by "employees."

Switchmen's itself – the very case on which the Board relies so heavily for its claim that we lack authority to review the Merger Procedures – thus makes abundantly clear that the Supreme Court crafted a very sweeping rule for a very limited class of cases: While the Board enjoys exceptional latitude when acting within its proper sphere of Section 2, Ninth power, that sphere itself is exceptionally narrow. Viewing *Switchmen's* in this light, it is difficult to conclude that the Supreme Court intended to insulate from review every action of the Board which arguably involves a question of representation, including those (like the one at bar) that bear absolutely no relationship to "find[ing] the fact" of who employees desire as their representative.[4] *Switchmen's*, 320 U.S. at 305; *accord*

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[4] The cases cited by the Board do not establish a contrary proposition. They merely confirm that the judiciary takes a back seat when the Board decides matters that are "necessary incident[s]" of its right and duty to find the fact of representation. *Railway Clerks*, 380 U.S. at 669 (form of the election ballot); *International Bhd. of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 202 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968) (balloting policy).

America West Airlines, Inc. v. NMB, 986 F.2d 1252, 1256 (9th Cir. 1992) (as amended Feb. 26, 1993). In this case, the Merger Procedures present a question of the Board's very jurisdiction – a question that is analytically distinct from and *antecedent to* the issue of whether the Board has correctly found the "fact" of representation. And as the Supreme Court emphasized, "the administrative remedy is exclusive" only *"[i]f* the present dispute *falls within* § 2, Ninth." *General Comm. of Adjustment*, 320 U.S. at 336 (emphasis added).

2. The Special Case of Jurisdictional Questions

As we explain below, we have no doubt that the Merger Procedures constitute a bald and insupportable arrogation of power not conferred by the RLA; as such, the Procedures are reviewable under the traditional *Leedom v. Kyne* analysis. We pause here, however, to note another theory, urged by appellants, under which the Merger Procedures might be amendable to judicial review.

As we have observed in a prior decision, this circuit's law on the reviewability of NMB orders has developed along two tracks. *See International Longshoremen's Ass'n v. NMB*, 785 F.2d 1098, 1099-1100 (D.C. Dir. 1986) (summarizing development of dual lines of authority). The first track holds that Board certification orders ordinarily are unreviewable, unless they fall within the ambit of *Leedom v. Kyne*. The second track, which had its genesis in two pre-*Leedom v. Kyne* decisions from the 1950s, holds that the court *may* review orders in which the Board concludes

that it *lacks* jurisdiction to resolve a representation dispute. *See American Air Export & Import Co. v. O'Neill*, 221 F.2d 829 (D.C. Cir. 1954); *Air Line Dispatchers Ass'n v. NMB*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951) ["*ALDA*"].

Appellants urge us to abolish this distinction and to adopt a rule that *all* matters involving the Board's jurisdiction, not merely refusals of jurisdiction, are reviewable. They point out that those circuits which have squarely confronted the issue have held that threshold questions implicating the Board's jurisdiction to act under Section 2, Ninth fall outside *Switchmen's* proscription against review. *See Delpro Co. v. Brotherhood Ry. Carmen*, 676 F.2d 960, 962 (3d Cir.) ("judicial review of NMB decisions concerning its own jurisdictional authority is not barred"), *cert. denied*, 459 U.S. 989 (1982); *International Longshoremen's Ass'n v. North Carolina Ports Auth.*, 463 F.2d 1, 3 (4th Cir.) (issue in *Switchmen's* "was not one of jurisdiction, but of the validity of a Board ruling on a substantial subject clearly within its authorized field"), *cert. denied*, 409 U.S. 982 (1972); *see also United States v. Feaster*, 410 F.2d 1354, 1361-62 (5th Cir.) (suggesting that judicial review of jurisdictional question might be available, but finding issue not ripe), *cert. denied*, 396 U.S. 962 (1969). Each of these cases involved the question whether a particular employer was a "carrier" within the meaning of the Act and thus subject to the Board's jurisdiction.

Although we need not resolve this issue conclusively in light of our holding that the Merger Procedures are reviewable under *Leedom v. Kyne*, on reexamination we find it difficult to support the distinction drawn in our prior cases between Board decisions asserting statutory

jurisdiction and those declining to exercise it. Indeed, in endorsing a distinction, *ALDA* noted that in *Switchmen's* and its two companion cases, "[t]he question was not as to the power of the Board to resolve the dispute but whether it had done so in an erroneous manner." *ALDA*, 189 F.2d at 687-88. Under this interpretation of *Switchmen's*, appellants' challenge to the Merger Procedures, which is based not on the substance of any Board certification but on the issue of whether the Board has threshold authority, or jurisdiction, to act in the absence of a request from the employees involved in a representation dispute, could logically be reviewable as well.

Although *ALDA* apparently considered *Switchmen's* and its companions to have reserved only the question whether a refusal to exercise jurisdiction was reviewable, *see* 189 F.2d at 688, we do not think *Switchmen's* must be read so narrowly. An assertion of jurisdiction based on the erroneous belief that authority exists does not materially differ from a refusal to exercise jurisdiction based on the erroneous conclusion that statutory authority is lacking, and *Switchmen's* may not preclude review of either determination. On this point, the Fifth Circuit has noted that "it might be said that while *Switchmen's Union* holds that there is no judicial review where the Board has exercised its informed discretion" on a matter related to finding the fact of representation, *Switchmen's* "does not preclude judicial review of questions of law which bear directly upon the jurisdiction of the Mediation Board." *Feaster*, 410 F.2d at 1361.

We are cognizant that it may not always be a simple task to distinguish between Board actions which implicate the Board's threshold jurisdiction and those which

are simply an erroneous exercise of functions legitimately entrusted to the Board's discretion under Section 2, Ninth (and, therefore, are reviewable only under the auspices of *Leedom v. Kyne*).[5] Inventive or mischievous litigants no doubt would find ways to characterize as "jurisdictional" a broad range of Board actions, even those that no one reasonably would doubt to be within the compass of the Board's authority under Section 2, Ninth. Because we do not wish to extend such an invitation unnecessarily, we rest on our holding that this case is reviewable under the traditional *Leedom v. Kyne* analysis and leave for another day a fuller reconciliation of the jurisdiction-exercising versus jurisdiction-declining dichotomy set up in *ALDA*.

B. Analysis of Section 2, Ninth

The Board does not deny that the Merger Procedures seek to allow both the Board and carriers to initiate representation proceedings under Section 2, Ninth. Nor does the Board deny that in this respect the Merger

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[5] The dissent's argument that "jurisdictional questions" are entitled to deference is misplaced. In making this argument, the dissent conflates reviewability under *Switchmen's* and deference under *Chevron*. Were we to decide that all questions involving the Board's exercise of jurisdiction under Section 2, Ninth were *reviewable*, that would not answer the question whether the exercise were proper; and, in some cases, we might well defer to the Board's construction of the RLA. In this case, the reason no deference is warranted is because we find no ambiguity in Section 2, Ninth. *See Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 843-44 (1984) (courts should defer to an agency's reasonable statutory construction only when Congress has left a gap for the agency to fill).

Procedures are directly at odds with more than fifty years of unbroken practice under Section 2, Ninth. We need look no further than the language of Section 2, Ninth, the structure of the Act, and its legislative history to determine that these proposed procedures are not only unprecedented, but legally insupportable as well. In its defense of the Merger Procedures, the Board offers little more than the argument that we should defer to its construction of Section 2, Ninth. Yet, the Board cannot point to any statutory text or legislative history to support its position. And our analysis leads us to the firm conclusion that Congress left no ambiguity in Section 2, Ninth: the Board may investigate a representation dispute *only* upon request of the employees involved in the dispute. For the Board to act otherwise is for the Board blatantly to exceed its statutory authority.

1. *The Plain Language*

Section 2, Ninth of the RLA provides:

> If any *dispute* shall arise *among a carrier's employees* as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, *upon request of either party to the dispute*, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and *certify*

> *the same to the carrier.* Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. § 152 Ninth (emphasis added).

The above language makes perfectly clear that, as used in Section 2, Ninth, the term "parties" includes neither carriers nor the Board itself. Indeed, the Board does not claim otherwise. Because the requisite "dispute" must arise "among a carrier's employees," per the first clause of Section 2, Ninth, the succeeding phrase "upon request of the *parties to the dispute*" can refer only to those same employees. If Congress had considered carriers to be embraced within "parties to the dispute," the final

clause of the first sentence would be entirely superfluous. There would be no need to command the Board to certify the results of the investigation "to *both* parties" and also to "certify the same to the carrier." *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (court's duty in construing statute is "to give effect, if possible, to every word Congress used"); *United States v. McGoff*, 831 F.2d 1071, 1080 (D.C. Cir. 1987) (same).

Furthermore, the entire structure of Section 2, Ninth makes it plain that representation investigations and elections are conducted only at the behest and for the specific protection of "employees." The "duty of the Mediation Board" to "investigate" does not arise except "upon request of either party," *i.e.*, "employees." The Mediation Board is only "authorized" to conduct an election in connection with *"such an investigation"* as is prescribed by Section 2, Ninth. When authorized to act, the Board is instructed to "insure the choice of representatives by the employees *without interference, influence, or coercion exercised by the carrier.*" An "election" can be conducted only *"for the purposes herein indicated," i.e.*, to resolve a dispute "among a carrier's employees" "upon request of either party to the dispute." And the Board is even given the power to gain access "to the books and records *of the carriers,*" but only to *"carry out the purposes and provisons"* of Section 2, Ninth.

In short, when read with care, it is apparent that, in enacting Section 2, Ninth, Congress was quite precise in defining what it meant by "[d]isputes as to [the] identity of representatives" – the title of Section 2, Ninth – and in codifying rules governing the resolution of such disputes.

As the Supreme Court has made clear, such "command[s]" are "enforcible by judicial decree." *General Comm. of Adjustment*, 320 U.S. at 335.

Reference to other sections of the RLA confirms that Section 2, Ninth does not contemplate action-initiating roles either for the Board or for carriers. Thus, where Congress intended carriers and employees to be treated alike (that is, like "parties") with respect to the resolution of particular disputes, this is made plain in the statute. Section 2, Sixth, for example, provides that "[i]n case of a dispute between a carrier or carriers and its or their employees, arising out of grievances . . . it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees . . . to specify a time and place at which [a conference] shall be held. . . . " 45 U.S.C. § 152 Sixth (1988). Similarly, Section 2, Second provides that "[a]ll disputes between a carrier or carriers and its or their employees shall be considered . . . in conference between representatives designated" by the carrier and employees. 45 U.S.C. § 152 Second (1988). These sections go far to negate any argument that the term "parties" in Section 2, Ninth should be read to encompass anyone other than the employees mentioned in the first clause of that section.[6]

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[6] We note that the Board itself relies on precisely the same sort of negative inference to argue that Congress "knew how to preclude authority that might otherwise be inferred." Brief for National Mediation Board at 39 n.24. The Board's argument leads nowhere, however, in light of the text of the statute, the legislative history, and the principle that agencies act only pursuant to delegations of power that are explicit or can *fairly* be implied. *See American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 965

It is also clear that where Congress meant to endow carriers with the right to invoke the Board's jurisdiction, or to authorize the Board to *offer* its services, it did so explicitly. Thus, Section 5, First provides that "[t]he parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases . . . ," 45 U.S.C. § 155 First (1988), and proceeds to state clearly the circumstances under which the Board's mediation services may be had. Section 5, First also explicitly empowers the Board to assert its jurisdiction *sua sponte*, providing that "The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time." *Id.*

The fact that Congress omitted equivalent language in Section 2, Ninth cannot be deemed unintentional or immaterial. Thus, for instance, in *Landers v. National Railroad Passenger Corp.*, 485 U.S. 652 (1988), the Supreme Court said: "That Congress [in the RLA] *expressly provided* railroad employees with the right to the representative of their choice in Adjustment Board proceedings, *but did not do so* with regard to any earlier phase of the dispute resolution process, is *persuasive evidence*" that such a right does not exist at earlier phases. *Id.* at 656 (emphasis added). *See also id.* at 657 (finding "no merit" in contention that right to be represented by minority union "is

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(D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). The Board seems not to understand that "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986).

implicit" in Section 2, Eleventh(c)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The inescapable conclusion from the plain language of Section 2, Ninth, therefore, is that Congress intended neither carriers nor the Board to initiate representation proceedings.

The crux of the Board's claim in this case is that as Section 2, Ninth does not *expressly forbid* the Board from asserting jurisdiction over a representation dispute in circumstances other than upon employees request, it should not be prohibited from doing so. But the language of Section 2, Ninth does not admit of this argument. The subordinate clause "upon request of the parties" expresses a limiting condition. Indeed, the entire first sentence of Section 2, Ninth imposes strict limitations on the Board's power. The sentence imposes four significant *conditions* that must be satisfied as a prelude to the Board's authority to investigate a representation dispute: there must be a dispute; the dispute must relate to representation; it must be among a carrier's employees; and one of the parties to the dispute must request the Board's services in resolving it. *See* 45 U.S.C. § 152 Ninth. Congress effectively has provided a "who, what, when, and how" laundry list governing the Board's authority. These limitations are utterly inconsistent with the notion that the Board blithely may decide that certain circumstances present such an inherent risk of a representation dispute that the Board may investigate at will.

Indeed, as established at oral argument, a finding that the Board may investigate representation disputes *sua sponte* would have far-reaching implications. Under such a regime, it would make no difference *who* brought an alleged dispute to the Board's attention – a rail passenger worried about service interruptions in the wake of a merger could write to the Board suggesting that it investigate, even where the merger in fact had created no representation issues (as might be the case if, for example, the same national union represented employees on both the merged and acquiring carriers). Furthermore, the Board's power to meddle in railway labor relations would not be limited to the merger context. The Board could just as well announce, for example, that internal union elections and change of leadership automatically warrant Section 2, Ninth investigations because those events create a possibility of employee dissatisfaction with their certified representative. Yet, the notion that the Board enjoys this sort of power is plainly belied by the tightly confined role Congress assigned to the Board under Section 2, Ninth.

2. *Legislative History*

When Congress took up the RLA amendments in May 1934, it had before it two versions of what is now Section 2, Ninth from which to choose. The House considered H.R. 7650, a bill prepared by rail labor and introduced by Representative Crosser, alongside H.R. 9689, a similar bill prepared by federal Commissioner of Transportation Joseph B. Eastman and introduced by Representative Rayburn. *See Railway Labor Act Amendments:*

Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 1 (1934) ["*H.R. 7650 Hearings*"]. The version that Congress rejected specifically treated carriers as a "party" to representation disputes, and thus would have left no question as to the right of carriers to invoke the Board's jurisdiction. The rejected language provided:

> If any dispute shall arise between a carrier and a group of its employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the third paragraph of this section, it shall be the duty of the Board of Mediation, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, [the identity of the designated representatives].

H.R. 7650, 73d Cong., 2d Sess. (1934) (Section 2, Eighth), *reprinted in* 1 THE RAILWAY LABOR ACT OF 1926 A LEGISLATIVE HISTORY, at 775 (ABA 1988) [hereinafter 1 RAILWAY LABOR ACT].[7] Congress' refusal to enact language which would have established unequivocally the carriers' right to invoke the Board's jurisdiction is strong evidence that Congress did not intend the Board to have the power to confer that right on its own. *Cf. Landers*, 485 U.S. at 656 n.3 (in finding that a claimed right was not implicit in Section 2, Eleventh, Supreme Court relies on the fact that

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[7] The House of Representatives ultimately passed H.R. 9861, a successor to H.R. 7650, which incorporated Section 2, Ninth as drafted by Commissioner Eastman and contained in H.R. 9689. Only H.R. 7650 contained a Section 2, Eighth that included carriers as parties to disputes.

Congress declined to enact proposed amendment that expressly would have established such right).

Section 2, Ninth was no insignificant piece of the 1934 amendments. Rather, as the legislative history makes clear, Congress thought it critical to establish machinery by which employees *independently* could choose their bargaining representatives. *See* H.R. REP. NO. 1944, 73d Cong., 2d Sess. 2 (1934), *reprinted in* 1 RAILWAY LABOR ACT, at 919; *see also* S. REP. NO. 1065, 73d Cong., 2d Sess., pt. 1, at 2 (1934), *reprinted in* 1 RAILWAY LABOR ACT, at 821. For while the original legislation enacted in 1926 embodied the principle of free choice of employee representatives, it supplied no procedures to guarantee such choice. Experience had shown that railway management subverted their employees' rights by "disputing the authority of the freely chosen representatives" to represent the employees. *See* H.R. REP. NO. 1944, at 2; *see also* SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 2-3 (1936) (principal defect of the 1926 Act was failure to provide means to insure employees' "right to select their representatives without influence or coercion from the management"). As the Board itself acknowledged in reflecting on pre-1934 history, "because employers have participated in" employee representation disputes, "bitter conflicts have often been precipitated." FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 4 (1935).

It would be incongruous to suppose, in light of this demonstrated problem and in light of the fact that H.R. 7650 was rejected, that the Board has some unarticulated, inherent authority to entertain Section 2, Ninth petitions from carriers. By invoking the Board's jurisdiction, a carrier could create a problem where employees saw none to

exist or thrust itself into the center of a representation fray and thus attempt to influence the outcome of any subsequent election. For example, if the carrier petitioned for a Section 2, Ninth investigation very shortly after a challenging union began to court employee allegiance, that action could hasten an election and effectively prevent a serious challenge to the incumbent union. The timing of a carrier's invocation easily might signal management's sympathies and thus constitute forbidden "interference, influence, or coercion" over the employees' designation of their representatives. 45 U.S.C. § 152 Third (1988). Such a scheme does not comport with the structure of the Act or with Congress' clearly expressed intent.

A closely related concern animating the 1934 amendments was the problem of company unions. Although company-controlled unions were "clearly contrary to the purpose" of the 1926 Act, the practice continued because the Act did not include specific language which would, for example, bar carriers from paying the salaries of employee representatives. H.R. REP. NO. 1944, at 2. The 1934 amendments emphatically were intended to prohibit company unions. *See* 78 CONG. REC. 11,713-14 (1934) (statement of sponsor Rep. Crosser); *id.* at 11,715 (statement of Rep. O'Connor). Thus, Section 2, Fourth spells out prohibitions on carrier conduct in some detail, providing, for example, that a carrier shall not "deny or in any way question the right of its employees to join [or] organize . . . the labor organization of their choice. . . . " 45 U.S.C. § 152 Fourth (1988). Section 2, Third also expressly prohibits "interference, influence, or coercion by either party over the designation" or choice of representatives by the other. *Id.* at § 152 Third. The concerns

expressed by members of Congress and addressed in Section 2, Third and Fourth point strongly toward the conclusion that carriers were to be screened out of any active role in the representation-selection process, in order to avoid any possible tainting of employees' free choice of representatives. *See also International Ass'n of Machinists v. Street*, 367 U.S. 740, 759 (1961) ("A primary purpose" of the 1934 amendments "was to strengthen the position of the labor organizations *vis-a-vis* the carriers").

The legislative history further suggests that the *sua sponte* investigation power claimed by the Board is antithetical to congressional intent. Because mediation was considered to be the Board's primary function, Congress sought to delineate the Board's other roles in a manner that would avoid compromising its effectiveness as a mediator. It was for that reason, for example, that both the House and the Senate amended the originally-proposed text of Section 2, Ninth so as to empower the Board to appoint a neutral committee to resolve sensitive representation-related issues. *See H.R. 7650 Hearings* at 71 ("to have mediation what it ought to be," Board "should have no power of decision save in the interpretation and administration of the law itself") (statement of Samuel E. Winslow, Chairman of Board of Mediation); *id.* at 40-41 (statement of Commissioner Eastman); S. REP. NO. 1065, 73d Cong., 2d Sess., pt. 1, at 3 (1934), *reprinted in* 1 THE RAILWAY LABOR ACT, at 822; *accord Switchmen's*, 320 U.S. at 302-03 (noting importance of maintaining Board's neutrality). *Cf. Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 580 (1971) (significant concern was expressed during passage of 1926 Act that Board be able

to "maintain the confidence of both" labor and management). The Merger Procedures trench on this carefully crafted structural scheme by robbing employees of their prerogative to determine whether and when formal procedures are needed to determine their representation. It takes little imagination to comprehend how quickly the Board could lose the confidence and trust of employees and labor organizations it dragged into unwanted elections. Thus, the Merger Procedures could well undermine the mediation effectiveness that Congress thought critical.

Tellingly, the Board cannot point to a single piece of the legislative history (let alone the text of the statute) that even remotely suggests it enjoys the sort of power it has claimed for itself under the Merger Procedures. To the contrary, by all indications, Congress thought the Board's powers were not self-initiating, but were to be triggered by a proper invocation thereof by one of the employee parties to the dispute.[8] *See H.R. 7650 Hearings* at 71 (Board should be kept "clean and free from everything that has gone on up to the time a dispute is actually *brought to it*") (statement of Samuel E. Winslow)

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[8] We are neither troubled nor persuaded by the Board's insistence that our "literal" reading of Section 2, Ninth would preclude unions from invoking the Board's jurisdiction, as has long been the practice. It is clear that in applying for investigation of a representation dispute, unions act only on behalf of employees, not as "parties" in their own right. *See, e.g.*, 29 C.F.R. § 1203.2 (1993) (written applications for investigation of representation disputes "should be accompanied by signed authorization cards from the employees composing the craft or class involved in the dispute").

(emphasis added); *id.* at 79 (Board will investigate if representation "controversy *is carried to* the Board") (statement of George M. Harrison) (emphasis added). Our review of the legislative history thus confirms our reading of the statutory text, and satisfies us that the Merger Procedures represent an unsustainable arrogation of power not conferred by Congress, and a "gross violation" of Section 2, Ninth by any reading of *Leedom v. Kyne*.[9]

C. *The Board's Consistent Interpretations and Practice*

Although we find the language and legislative history dispositive, we briefly review the Board's longstanding interpretation of Section 2, Ninth. We find it telling that only in the last five years of its sixty-year history has the Board claimed that Section 2, Ninth affords it the authority to initiate representation disputes or to permit carriers to do so. The Board fails to point to anything in its pre-Merger Procedures history that so much as hints at the existence of such "latent" authority. As such, the Merger Procedures are much more than a midstream change in course; they are a wholesale attempt to rewrite the statute and history.

We note in passing that the mere fact that the Board never before has claimed the authority embodied in the

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[9] In light of our conclusion that Section 2, Ninth permits only employees to invoke the Board's jurisdiction, we find it unnecessary to reach RLEA's additional contention that there is no "dispute" within the meaning of that section when the carrier or the Board initiates a Section 2, Ninth investigation.

Merger Procedures does not mean that such authority, if granted by Congress, has ceased to exist. *See United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950). However, our analysis of the statute and the legislative history convinces us that Congress did not confer the powers claimed under Section 2, Ninth, in which case, of course, it goes without saying that the bald assertion of power by the agency cannot legitimize it. *See id.*

From its inception, the Board has understood Section 2, Ninth to screen carriers *out* of the certification proceedings: "The 1934 amendments give authority to the National Mediation Board to determine the choice of employee representatives *without interference by management* . . . . " SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 3 (1936) (emphasis added). *See also* FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 4 (1935) (Congress deliberately "eliminated [management], as a party, from any such controversy"). The Board, moreover, "has consistently interpreted the second and third general purpose of the act along with section 2, first and third, to exclude the carrier as a party to section 2, ninth, disputes,"[10] THIRTY-EIGHTH ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 30 (1972), and it has reiterated that view even after promulgating the Merger Procedures. *See* FIFTY-FIFTH AND FIFTY-SIXTH ANNUAL REPORTS OF THE NATIONAL

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[10] The second and third general purposes of the Act are "(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; [and] (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter. . . . " 45 U.S.C. § 151a.

MEDIATION BOARD 33 (1989-1990) ("Carriers are not a party to representation elections . . . ").

The Annual Reports and published Board decisions are equally telling for what they do *not* contain, namely, any suggestion that the Board itself has power to initiate a Section 2, Ninth investigation. Rather, the Board's long-standing practice makes it clear that, until recently, there never has been even the slightest confusion over the limited authority of the NMB. *See* Dana E. Eischen, *Representation Disputes and Their Resolution in the Railroad and Airline Industries, in* THE RAILWAY LABOR ACT AT FIFTY 29 (1977) (Board, "with rare exceptions, has viewed its own role [under Section 2, Ninth] as narrowly circumscribed"). Regulations that have been in effect since 1947 clearly contemplate that representation investigations will be initiated only by employees or their representatives. *See* 29 C.F.R. § 1203.2 (1993) (requiring applications for Board services to be in writing and accompanied by signed authorization cards from employees); *id.* at § 1202.3 (Board shall investigate upon request of the parties). There simply is no suggestion that the Board may investigate under any other circumstances. *See generally id.* at §§ 1202.3-1202.8 (1993) (containing no suggestion of power to investigate representation disputes absent request of parties). *Compare id.* at § 1202.1 (Board "may proffer its [mediation] services" any time it finds a labor emergency).

Although we are not legally bound by the Board's past constructions of Section 2, Ninth, it is surely noteworthy that these constructions do not in any way endorse the current position of the Board. For more than

fifty years, the Board conducted representation investigations *only* upon request of employees, and the evidence indicates that the Board never even assumed that it had the authority to act *sua sponte* or at the request of a carrier.

D. The Board's Claim of Implied Authority to Promulgate the Merger Procedures

As noted above, it is beyond cavil that "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). The Board errs grossly in suggesting that "the question . . . is whether the Act expressly precludes the Board from choosing" to adopt the Merger Procedures. Brief for National Mediation Board at 43. Quite to the contrary, the question is whether the Board's "exercise of quasi-legislative authority" is "rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

Unable to link its assertion of authority to any statutory provision, the Board's position in this case amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area. We categorically reject that suggestion. Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it"); *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 965 (D.C. Cir. 1985) ("The extent of [an

agency's] powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background.") (citation omitted), *cert. denied*, 475 U.S. 1011 (1986). The *duty* to act under certain carefully defined circumstances simply does not subsume the *discretion* to act under other, wholly different, circumstances, unless the statute bears such a reading. We cannot conclude, as the Board would have us do, that the fact that the Board is empowered to certify employee representatives in certain limited situations means the Board therefore enjoys such power in every instance in which a question of representation arguably exists. The language of Section 2, Ninth, the structure of the Act, and the legislative history all compel a contrary conclusion.

Nor is this a case in which principles of deference to an agency's interpretation come into play. Such deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied "delegation of authority to the agency." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). As we have already explained, "Congress has directly spoken to the precise question at issue" in this case, *id.* at 842, so there is no gap for the agency to fill. The text of Section 2, Ninth is plain; the legislative history and Supreme Court precedent underscore the limited role for carriers and for the Board under that section; and the Board can point to no contrary suggestion anywhere in its sixty-year history.

To suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative

power (*i.e.*, when the statue is not written in "thou shalt not" terms), is both flatly unfaithful to the principles of administrative law outlined above, and refuted by precedent. *See, e.g., Natural Resources Defense Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (" '[I]t is only legislative *intent to delegate* such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*' ") (quoting *Kansas City v. Department of Housing & Urban Dev.*, 923 F.2d 188, 191-92 (D.C. Cir. 1991)) (emphasis added). Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.

III. Conclusion

The judgment of the District Court dismissing RLEA's complaint is hereby reversed. Case number 91-5223 is remanded for entry of declaratory and injunctive relief in favor of appellants; and case number 91-5310 is remanded for reconsideration in light of the new judgment in case number 91-5223.

So Ordered.

Randolph, *Circuit Judge, concurring*, with whom Mikva, *Chief Judge*, Wald, Edwards, and Sentelle, *Circuit Judges*, join: Professor Henry M. Hart's celebrated "Dialogue" describes *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), as "too weakly reasoned to

have much growing power." HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 409 (Paul M. Bator et al. eds., 3d ed. 1989). Yet grow it must, by leaps and bounds, to cover this very different case.

Years ago we held *Switchmen's* in one hand and *Leedom v. Kyne*, 358 U.S. 184 (1958), in the other, looked back and forth at the opinions and extrapolated the following: "peek at the merits" and if you see the National Mediation Board committing an "obvious" error in performing its certification duties, an error "gross" enough to constitute defiance of a statutory mandate, then and only then review the Board's action. *International Bhd. of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968). In my view, whether the original majority opinion in this case just peeked or whether, as Judge Williams thought in dissent, it threw the door wide open and looked the merits straight in the eye, is beside the point. To ask the questions is to assume, incorrectly, that *Switchmen's* applies to the case before us.

"Generalizations," Justice Douglas wrote for the Court, "as to when judicial review of administrative action may or may not be obtained are of course hazardous." *Switchmen's*, 320 U.S. at 301. That was 1943; the hazards are now long gone. Federal courts run little risk in generalizing, as they now often do, that judicial review of agency action is presumptively available. *See, e.g., Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962); *Armstrong v. Bush*, 924 F.2d 288, 291 (D.C. Cir. 1991). Enactment of the Administrative Procedure Act, and particularly 5 U.S.C. § 704, made it safe to say that judicial review "will not be cut off

unless there is a persuasive reason to believe that such was the purpose of Congress." *Abbott Labs.*, 387 U.S. at 140. This principle derived from the APA, and not *Switchmen's*, controls.

Not *Switchmen's* because the Supreme Court's decision and the Court's explanation for it do not speak to the type of Board action at issue here. In *Switchmen's*, one union sued to set aside the Board's order certifying, pursuant to § 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152 Ninth, a rival union as the authorized collective bargaining agent. The union argued that the Board had misconstrued its authority under the Act with respect to the appropriate bargaining unit. The Board issued its certificate in an adjudication as the APA defines it, that is, an "agency process for the formulation of an order." 5 U.S.C. § 551(7). An inter-union dispute of the sort involved in *Switchmen's*, the Court said, raised an "explosive problem," a problem Congress – through its silence – left to the Board alone to decide without any "dragging out of the controversy into other tribunals of law." 320 U.S. at 303, 305. To allow the dispute to fester while it worked its way through the courts would, in other words, tend to defeat the Act's purpose of "prevent[ing], if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 148 (1969). As the Court wrote in the companion case to *Switchmen's*, "[h]owever wide the range of jurisdictional disputes [between unions] embraced within § 2, Ninth, Congress did not select the courts to resolve them." *General Comm. v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 336 (1943) (footnote omitted).

In case number 91-5223, however, we are not faced with a feud between rival unions.† The Board has not adjudicated such a jurisdictional dispute. It has not issued a certificate pursuant to § 2, Ninth. There is no "explosive problem," no simmering controversy demanding swift and final settlement. We are asked to review the Board's issuance of the *Merger Procedures* described in the majority's opinion. These are plainly "rules" within the meaning of the APA – that is, "agency statement[s] of general . . . applicability and future effect designed to implement . . . policy" (5 U.S.C. § 551(4)). I would therefore follow the analysis in *Air Line Dispatchers Ass'n v. National Mediation Board*, 189 F.2d 685, 687-89 (D.C. Cir. 1951). *Switchmen's* or not, the APA still controls. Under the APA, there is judicial review unless the statute, by its terms or as judicially interpreted, precludes it. 189 F.2d at 688, citing THE ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 136 (1947). *Switchmen's* interpreted the Railway Labor Act to bar judicial review of Board adjudications. But that interpretation and the reasons behind it do not reach the Board's rulemaking in this case. In light of the presumption in favor of judicial review and because there is no "clear and convincing evidence," *Abbott Labs.*, 387 U.S. at 141 (quoting *Rusk*, 369 U.S. at 379-80), that Congress intended to insulate board rulemaking from judicial scrutiny, the APA gives petitioners the right to a decision on the merits and the APA obligates this court to give it. *Air Line Dispatchers Ass'n*, 189 F.2d at 689.

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† I agree with the majority's decision to remand case number 91-5310 in light of our disposition of case number 91-5223.

Why, the dissent nevertheless asks, should *Switchmen's* not be stretched to insulate Board rulemaking as well as Board adjudications of inter-union disputes? The APA gives the answer. After the APA, judicial review may be "preclude[d]" *only* "to the extent" a statute so provides. 5 U.S.C. § 701. No statute, certainly not § 2, Ninth of the Railway Labor Act, bars judicial review of Board rulemaking and no court, before or after enactment of the APA, has ever ruled otherwise. According to the Attorney General's Manual, the concept embodied in the APA's "to the extent" (or, as it then read, "so far as") clause is "a most important principle of construction"; it is a principle intended to recognize that statutes do not always bar "judicial review altogether" and it is a principle the dissent completely disregards. Manual at 95; *see also* III KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.8, at 153-58 (1994). The Attorney General's Manual illustrates the point with a case in which a fired federal employee cannot challenge the agency's judgment to remove him from office, but can obtain judicial review of the question whether the agency followed the required procedures. *Id. Bowen v. Michigan Academy of Family Physicians*, 467 U.S. 667 (1986), supplies a more contemporary example. Although *United States v. Erika, Inc.*, 456 U.S. 201 (1982), held that under Part B of the Medicare program, computations of awards are not subject to judicial review, *Michigan Academy* held that regulations governing how the awards are computed are reviewable. *Switchmen's* is to *Erika* as this case is to *Michigan Academy*. Unlike most other agencies, the National Mediation Board's exercise of adjudicatory authority is

generally immune from judicial scrutiny, but like other agencies its exercise of rulemaking power is not.

As to the merits, I fully agree with the majority's well-reasoned decision that the *Merger Procedures* are contrary to the Act.

WILLIAMS, *Circuit Judge,* dissenting: Congress provided in the Railway Labor Act that if a "dispute shall arise among a carrier's employees as to who are the representatives of such employees . . . , it shall be the *duty* of the Mediation Board, *upon request of either party to the dispute,* to investigate such dispute and to certify . . . the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute. . . . " Railway Labor Act, § 2 Ninth, 45 U.S.C. § 152 Ninth (emphasis added). From this explicit duty, the court infers not merely the absence of any *duty* to investigate representation disputes *sua sponte* (a clearly valid reading), but the absence of any Board *authority* ever to do so. Accordingly the court invalidates procedures that the Board established to address conflicting representational claims arising from mergers of carriers under the Board's jurisdiction. *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry,* 17 NMB 44 (1989) (the "Merger Procedures").

With admirable candor, the court explicitly discards the model of highly deferential review laid down by the

Supreme Court for Board decisions, see *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), and *Leedom v. Kyne* 358 U.S. 184 (1958), and adopts the view that the Administrative Procedure Act overturns the *Switchmen's/Leedom* approach and substitutes conventional review of agency action – at least where the Board's action takes the form of a rulemaking. See Concurring Op. at 1-4; Maj. Op. at 5 n.1 (adopting view of concurring opinion). This distinction between rulemaking and adjudication evidently drives the outcome, for the court explicitly invalidates the Board's *rules*, Maj. Op. at 28, and merely remands its *adjudication* applying those rules, *id.*

In the alternative, the majority characterizes the issue – the propriety of the Board's exercising its investigatory and certification power without a request by an employee or union – as jurisdictional, and suggests that this feature may render *Switchmen's/Leedom* completely inapplicable. Maj. Op. at 13-15.

Finally, the court purports to apply the *Switchmen's/Leedom* mode of analysis, and declares the Board's rule a "gross violation" of the Act, Maj. Op. at 24, though in fact giving the Board no more deference – and probably less – than is prescribed by *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and conventional review of agency decisions.

Neither of the court's two theories for displacing *Switchmen's/Leedom* – the APA or the characterization of the issue as jurisdictional – appears convincing. Considered with the exceptional deference that those cases

require, the Merger Procedures easily pass muster. I dissent.

1. The APA

Any idea that the APA completely sweeps *Switchmen's* aside is quite inconsistent with the language of that decision and the APA, with the history of the APA, and with post-APA decisions. The Supreme Court framed the *Switchmen's* decision as one of statutory interpretation, finding that Congress had precluded judicial review except in narrowly and expressly prescribed instances. "Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." 320 U.S. at 302. Not surprisingly, we have found that the APA did nothing to change that result, noting that § 10 of the APA is expressly inapplicable where "statutes preclude judicial review", 5 U.S.C. § 701(a)(1). *American Air Export & Import Co. v. O'Neill*, 221 F.2d 829, 830 (D.C. Cir. 1954); but cf. *Air Line Dispatchers Ass'n v. NMB*, 189 F.2d 685, 689 (D.C. Cir. 1951). The Attorney General's Manual on the Administrative Procedure Act (1947), the APA's primary legislative history, cites *Switchmen's* as a sample "interpretation of a statute [ ] intended to preclude judicial review although the statute does not expressly so provide", *id.* at 94, thus locating NMB decisions – at least to the degree covered by *Switchmen's* – squarely in the category classified as unreviewable under the APA. And since enactment of the APA the Court itself has summarized *Switchmen's* in virtually the language of the APA exception, describing it as a case holding "that the Act precluded review of the

Board's certification of a collective bargaining representative under § 2, Ninth." *Brotherhood of Railway & S.S. Clerks v. Association for the Benefit of Non-Contract Employees* ("*Railway Clerks*"), 380 U.S. 650, 658 (1965).

The concurring opinion (and the majority) would evidently distinguish between adjudicatory orders of certification and Board rules resolving certification issues. See Concurring Op. at 2-4. Certainly the APA invites no such distinction, providing generally for review of "agency action", 5 U.S.C. § 702, subject of course to the explicit exceptions of § 701. And while critics of *Switchmen's* have noted that the decision itself left open whether a court would affirmatively *enforce* a Board order without considering its legality, see Hart and Wechsler's The Federal Courts and the Federal System 409 (Paul M. Bator, et al. eds., 3d ed. 1988), I can see no basis for holding *Switchmen's* inapplicable to *rules*.[1] It is true, as Judge Randolph points out, that *Switchmen's* in part rested on an inferred congressional judgment against any "dragging

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[1] I am assuming for the sake of argument that the challenge here concerns a "rule" and not a policy statement, which would not bind the agency. See, e.g., *Public Citizen, Inc. v. U.S. NRC*, 940 F.2d 679, 682 (D.C. Cir. 1991). While the Merger Procedures do oblige carriers to report mergers to the Board, they do not clearly bind the Board to investigate in any particular case. Merger Procedures, 17 NMB at 53-54 ("Carriers . . . may invoke the Board's services for a determination of the post-merger status of any NMB certifications"); *id.* at 51 ("The Board's investigation shall take the form required by the circumstances"). As the logic of excepting rules from *Switchmen's/Leedom* is unclear, it is anyone's guess whether the exception would embrace a policy statement, which is often reviewable only at the time of application.

out of the controversy into other tribunals of law", *id.* at 305, possibly arising out of congressional concern for quick dispatch of immediate representation controversies, but the Court's prime reliance was on the statutory structure. See *id.* at 305-06. And in *Railway Clerks* the Court spoke of Congress's allocation of power between the Board and the judiciary in terms completely divorced from any immediate exigencies: "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." 380 U.S. at 662.

Further, to the extent that the *Switchmen's* Court was influenced by perceptions of a congressional desire to resolve explosive problems quickly, that concern seems applicable here. The Merger Procedures attempt to deal efficiently with disputes before they escalate. Stonewalling by either side over rules of the game – sure to develop and be manifested as requests for stays of adjudications hinging on the outcome of judicial review of such rules – will undermine the dispatch evidently sought by Congress. Also, as pointed out by Airline Industrial Relations Conference and Regional Airline Association as amici:

> [I]nvalidation of the merger procedures would likely place a cloud over the status of the certifications, voluntary recognitions, and revocation of certifications resulting in [previously decided applications], and could result in unnecessary litigation and disrupt the stable post-merger collective bargaining relationships now in place.

> The destabilizing impact of the loss of the merger procedures would be even more significant in the future. . . .
>
> [Before the Merger Procedures, carrier decisions made without NMB clarification] frequently resulted in unresolved disputes, litigation and potential disruptions of airline operations.

Amicus Br. at 10-11.

Besides, the rule/adjudication distinction sets up perverse incentives for the Board, denying it the benefit of *Switchmen's* only when it gives widespread notice and opportunity to comment, and seeks to crystallize its views in a formal rule. After years of scholarly exhortations to agencies to make more use of rulemaking, because of that method's capacity to acquaint the agency with a wide range of viewpoints and to produce clear guidance for regulated parties,[2] it seems anomalous for

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[2] Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L. J. 1463, 1482-83 (1992); Charles J. Morris, *The NLRB in the Dog House – Can an Old Board Learn New Tricks*, 24 San Diego L. Rev. 9, 27-42 & n.80 (1987) (citing numerous articles treating the advantages of rulemaking); Richard K. Berg, *Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 Admin. L. Rev. 149, 163-64, 170 (1986); Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 Cal. L. Rev. 1276, 1313-15 (1972); but cf. Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485, 514-16 (1970). For similar arguments directed at state agencies, see Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 Admin. L. Rev. 121, 122-36 (1990).

this court to load the dice against NMB rulemaking. I see no basis for a rulemaking exception to *Switchmen's*.

2. Jurisdictional Issues

The court alternatively addresses, although ultimately declines to rely on, Railway Labor's argument that the interpretive issue before us is "jurisdictional" and therefore is outside the constraints of *Switchmen's/Leedom*. Maj. Op. at 13-15. In doing so it draws on a line of cases in our circuit granting review where the Board *declines* to exercise jurisdiction. See, e.g., *Air Line Dispatchers Ass'n*, 189 F.2d at 689. Finding the distinction between shortfalls and excesses of jurisdiction unsupportable, the court hints that it might extend the exception to any issue deemed jurisdictional.

I have no quarrel at all with the majority's rejection of the distinction between excesses and shortfalls of jurisdiction. But to review *de novo* any Board determination that the reviewing court classifies as jurisdictional is the wrong way out.[3] While courts commonly classify issues as relating to the "jurisdiction" of Article III courts, and make consequences turn on the classification, the categorization is typically self-evident because of language in the controlling documents, see, e.g., Art. III, § 2 ("The judicial power shall extend to. . . . "); 28 U.S.C. § 1331 ("The district courts shall have original *jurisdiction* of all civil actions arising under the Constitution, laws or treaties of

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[3] The Board argues persuasively that in fact our prior reviews of non-exercises of jurisdiction can be justified as mere applications of *Leedom*.

the United States"); 28 U.S.C. § 1291 ("The courts of appeals . . . shall have *jurisdiction* of appeals from all final decisions of the district courts. . . . "). While Congress elsewhere in the Railway Labor Act expressly framed its mandate in jurisdictional terms, see 45 U.S.C. § 155 First (entitled "Disputes within jurisdiction of Mediation Board"), the section here in dispute, § 2 Ninth, uses no such label, and the majority offers no interpretive principles for identifying provisions as jurisdictional. Indeed, the majority acknowledges the hazards in making such classifications. See Maj. Op. at 15.

In the absence of a manageable line between jurisdictional and other issues, non-deference for "jurisdictional" issues is just a tag for the court's conclusion. "[T]here is no discernible line between an agency's exceeding its [jurisdictional] authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia J., concurring). See also Louis L. Jaffe, Judicial Control of Administrative Action 356-57 (1965). Thus, while appellants' brief seeks to distinguish between "cases concerning whether the NMB erroneously exercised its functions under Section 2 Ninth" and ones where "the issue is whether the NMB has the statutory authority to perform those functions at all", Opening Br. at 26, the purported dichotomy falsely assumes that an agency has "authority" to act erroneously in exercising its functions.

Presumably out of reluctance to use an undefinable category, the Supreme Court has not withheld *Chevron*

deference in the face of claims that the issue was jurisdictional. See *Reiter v. Cooper*, 113 S. Ct. 1213, 1221 (1993) (applying *Chevron* to ICC's determination that statute did not grant it "initial jurisdiction . . . with respect to the award of reparations"); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986) (applying *Chevron* to scope of the Commission's jurisdiction over counterclaims); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 n.7 (1984) (pre-*Chevron* decision expressly rejecting proposition that a different level of deference guides review of "a jurisdictional or legal question concerning the coverage of" the National Labor Relations Act). Nor have we. See *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 813 (D.C. Cir. 1993) (applying *Chevron* to issue whether provision of Interstate Commerce Act "is an independent source of authority" to modify collective bargaining agreements in a specific class of cases); *Texas Utilities Electric Co. v. Federal Communications Commission*, 997 F.2d 925 (D.C. Cir. 1993). In *Texas Utilities* we upheld the FCC's authority, under a statute granting it power over "attachment by a cable television system" to utility poles, to regulate attachments for cables carrying nonvideo services, expressly formulating the issue as whether such cables fell "within the FCC's regulatory jurisdiction." *Id.* at 936. That issue seems no different in character from the question presented in *Switchmen's* itself – whether the NMB had the authority to divide a "craft or class".

Indeed, *any* issue may readily be characterized as jurisdictional merely by manipulating the level of generality at which it is framed. Thus, one could ask in *Switchmen's* whether the Board had authority to issue

certifications dividing a "craft or class" into subsets based on the area in which specific members worked (which the Board had denied), cf. 320 U.S. at 390 (Reed, J., dissenting), or one could ask whether the Board misapplied its authority by declining to make such divisions. Similarly, the issue here can be characterized as whether the Board had jurisdiction to investigate labor disputes within the railroad industry in the absence of a request by one of the parties, or as whether it misapplied its undoubted jurisdiction to investigate labor disputes in the industry. Such pliable labels should not control the scope of review.

3. Application of *Switchmen's/Leedom*

It remains to apply the principles laid down in *Switchmen's* and qualified in *Leedom*. In *Switchmen's* the Court held the Board's certifications of labor representatives completely unreviewable – at least at the instance of a party seeking to set aside the certification (leaving open how courts should address efforts to invoke judicial equity powers to affirmatively enforce such a certificate, see 320 U.S. at 307). As we have already seen, the issue of the meaning of "craft or class" could have been characterized as jurisdictional, and the Court expressly viewed it as a purely legal question, saying that the statute gave the Board the authority to interpret the words of the statute except in those instances where Congress had specifically called for judicial review. *Id.* at 305-06. Largely from the presence of express provisions for judicial review, the Court concluded "if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say *on any*

aspect of the problem [apart from those explicitly covered], it would have made its desire plain". *Id.* at 303 (emphasis added). The Court later summarized *Switchmen's* as involving "a question of statutory construction" and as holding that "it was for the Board, not the Courts, finally to resolve such questions". *Railway Clerks,* 380 U.S. at 658-59.

The *Switchmen's* Court adopted this view in the face of a dissent starkly pointing out the hazards. Justice Reed observed that the Court had authorized the NMB to determine "the statutory limits of its own powers as well", *Switchmen's,* 320 U.S. at 321 (Reed, J., dissenting), and that such a deferential rule "risk[ed] administrative action beyond or contrary to the legislative will", *id.* at 312. Perhaps moved by such concerns, the Court in *Leedom v. Kyne,* 358 U.S. 184 (1958), created a narrow exception to prevent the Board from flouting a clear, nondiscretionary duty under the statute. At issue was an order of the National Labor Relations Board in certification proceedings under § 9 of the NLRA. The statute stated "the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and [non-professional employees] unless a majority of such professional employees vote for inclusion in such unit". *Id.* at 185. The NLRB *conceded* that "in commingling professional with nonprofessional employees . . . it had acted in excess of its powers", *id.* at 187, and the Court found judicial relief available. Evidently not regarding even conceded legal error as a sufficient ground for judicial interference, the Court emphasized that the Board order was "contrary to a *specific* prohibition in the Act", *id.* at 188 (emphasis

added) and was "an attempted exercise of power that had been *specifically withheld*", *id.* at 189. It stressed how patent a violation the Board had committed, describing the statutory provision at issue as "clear," "mandatory," and "definite". *Id.* at 188, 189.

In this circuit we have used a number of formulae to characterize the power of review established by *Leedom*. We have, for example, read it to permit review only in instances of "gross violation of the statute". *International Bhd. of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir. 1968). And we have read the *Switchmen's/Leedom* combination as mandating a form of judicial review that is "one of the narrowest known to the law". *International Ass'n of Machinists v. TWA*, 839 F.2d 809, 811, amended in technical part, 848 F.2d 232 (D.C. Cir. 1988). A reviewing court may only "peek at the merits" and may interfere only if the peek reveals an error "as obvious on the face of the papers as the violation of specific statutory language". *International Bhd. of Teamsters*, 402 F.2d at 205. The insistence on specific statutory language accords with the Supreme Court's parallel statement in *Railway Clerks* that without a "specific requirement" in the Act itself, it is not sufficient to rely on "terms of policy and broad generalities as to what the Railway Labor Act should provide". 380 U.S. at 671.

Review under *Switchmen's/Leedom* would appear to be *at least* as deferential to the agency as if review under *Chevron* stopped after the application of so-called "prong one". In that phase of review, we determine "whether Congress has directly spoken to the precise question at issue", *Chevron*, 467 U.S. at 842, or has "unambiguously expressed" its intent, *id.* at 843. If it has done so, the

congressional intent of course controls despite what the agency may think. If Congress has been ambiguous on the issue, however, we go on to consider whether the agency's interpretation is a "reasonable" one, and uphold any such reasonable view, *id.* at 844, even though there may be another reasonable interpretation that we would adopt if resolving it *de novo, id.* at 843 n.11.

Unless an agency decision would flunk the first prong of the *Chevron* test, i.e., violate the "unambiguously expressed" intent of Congress, I do not see how it can be invalid under the emphatically restrictive form of review permitted by *Leedom* as an exception to *Switchmen's.*

* * *

A "peek at the merits" reveals no "clear" error in the Board's reading of the statute. The pertinent section is worded as follows:

> *If any dispute shall arise among a carrier's employees as to who are the representatives of such employees* designated and authorized in accordance with the requirements of this chapter, *it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties,* in writing, within thirty days after the receipt of the invocation of its services, *the name or names of the individuals or organizations that have been designated and authorized to represent the employees* involved in the dispute, and certify the same to the carrier.

Railway Labor Act, § 2 Ninth, 45 U.S.C. § 152 Ninth (emphasis added).

The Board's Merger Procedures provide that railroad carriers that have merged "may invoke the Board's services for a determination of the post-merger status of any NMB certifications on the applicable properties." See Merger Procedures, 17 NMB at 54. They also allow the Board to act on its own initiative. See *id.* at 50-51. Investigation and certification – sorting out which union represents which employees when the employees dispute such matter – are incontestably what § 2 Ninth authorizes the Board to do. "[S]o long as the Board is acting with the purpose of 'find[ing] the fact' as to who is the employees' representative, the courts are deprived of jurisdiction to review Board decisions." *America West Airlines v. NMB*, 986 F.2d 1252, 1256 (9th Cir. 1993).

While the appellants argue that the Board is undertaking to resolve matters that are *not* representation disputes between unions, the Merger Procedures suggest nothing of the sort. The Procedures assert a power to investigate only whether the merged carriers will operate or are operating "as a single transportation system", Merger Procedures, 17 NMB at 51, which would necessitate a *single representative* for each "craft or class" within the system. See *Alia Royal Jordanian Airlines/IBT*, 10 NMB 389, 390 (1983); *Seaboard System Railroad-Clinchfield Line*, 11 NMB 217, 224 (1984) (citing the *First Annual Report of the National Mediation Board* (1935)). If two or more unions claim to represent the same craft or class, they would seem to be in dispute, both as the term is used in ordinary language and as it is used in § 2 Ninth. Nothing in the Procedures asserts an intention to proceed in the absence of such a dispute, i.e., unless more than one

union claims to represent a single craft or class, or (conceivably) workers in a single craft or class identify more than one union as their representative. The Procedures call explicitly for comments by incumbent representatives, 17 NMB at 54, who will presumably reveal their harmony when it exists. In the adjudication before us, the Burlington Northern case, where unions made conflicting representational claims, the Board resolved them and then stopped. Findings Upon Investigation, 18 NMB 240, 260 (1991). Thus the Procedures themselves and the application before us manifest an intent merely to resolve union or employee disputes as to who represents which employees and to certify the results.

While § 2 Ninth imposes on the Board a specific *duty* to act under some circumstances (a request by a party), it says nothing "clear" or "explicit" or "specific" or "definite" about *capacity* to act when representation disputes within the railroad industry come to its attention by other means. The Board does not assert that carriers are "parties" entitled to "request" such investigation or certification; the Supreme Court in *Railway Clerks* previously upheld the Board's rejection of the carriers' claim of a statutory entitlement to participate as parties. 380 U.S. at 666-68. The Court held that the Act did not "*require* that [the carrier] be made a party to whatever procedure the Board uses to define the scope of the electorate", *id.* at 666 (emphasis added), but went on to say that "[w]hether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board", *id.* at 666-67. In the Merger Procedures the Board has sought to exercise that discretion.

The Court in *Leedom* stressed a principle behind the *Switchmen's* exception – the protection of specific rights granted in legislation. *Leedom*, 358 U.S. at 190-91. Here, the employees have shown no specific "right" on which the Merger Procedures might be thought to encroach. Indeed, insofar as stultification of the agency will preserve multiple representation of workers in a single craft in a single system (as indeed it will), it will preserve *violations* of the systemwide representation rule adopted by the Board under § 2 Fourth. See *Seaboard*, 11 NMB at 226-27. True, any employee has a right to request a Board investigation when a dispute among employees arises, and if the Board were to adopt procedures renouncing its duty to act upon these requests, reversal under *Leedom* review would appear appropriate. But nothing in the Merger Procedures strips employees of the specific right to invoke the Board; the Procedures merely grant the same right to others without impairing the employees' ability to request investigations.

Thus I agree in full with the majority's view that the reasoning of *Leedom* cannot be confined to "shall not" commands in the statute. Some agency *refusals to act* would violate a plain statutory duty or command, see *Miami Newspaper Printing Pressmen's U. Local 46 v. McCulloch*, 322 F.2d 993, 997 (D.C. Cir. 1963) (refusals to certify election results may be reversible under *Leedom*); cf. *Air Line Dispatchers Ass'n*, 189 F.2d at 689 (pre-*Leedom* case finding jurisdiction to review claim that Board inaction completely defeats statutory rights). But to apply *Leedom* to the present case disregards the admonition of *General Committee of Adjustment v. Missouri-Kansas-Texas R.R. Co.*, 320 U.S. 323 (1943), that "the command of the

Act should be *explicit* and the purpose to afford a judicial remedy *plain* before an obligation enforcible in the courts should be implied". *Id.* at 337 (emphasis added).

Further, I can imagine a "clear" or "plain" statutory violation even in a case where the statute does not literally spell out the command or prohibition violated. Judge Leventhal's phrase in *International Bhd. of Teamsters* – an "error . . . *as obvious as* the violation of specific statutory language" was well chosen. Thus contextual elements – some powerful linguistic norm, an important substantive background assumption, legislative history of unusual clarity, or prior judicial interpretive authority – might be so convincing that the peek at the merits would disclose a violation. No such element is present here. The majority invokes two of these possibilities – the legislative history and a linguistic norm (the concept that the expression of one thing excludes alternatives not expressed). Neither suffices.

Before turning to legislative history and linguistic norms, I will briefly address the issue of past Board practice. It seems most improbable that this could ever seriously influence the outcome of review under *Switchmen's/Leedom*, since even the more intrusive review under *Chevron* recognizes that agencies may alter their interpretations of the statutes they are charged to enforce without forfeiting the deference they are otherwise due. *Chevron*, 467 U.S. at 863. Thus, even reading previous Board pronouncements as disclaimers of the authority asserted here, see Maj. Op. at 25-26, would not affect the case. Further, there is no possible way the past practice can be read as completely disclaiming statutory authority to investigate and certify *sua sponte*. The Board has an

established practice of *sua sponte* investigation where it discovers election fraud, see, e.g., *International Bhd. of Teamsters*, 402 F.2d 196, and, as mergers necessarily change the "systems" to which the Board's principle of systemwide representation applies, its action here vindicates a similar interest. There is simply no warrant for the majority's claim that such Board efforts to preserve the integrity of past certifications will under cut the neutrality necessary for its mediation functions under § 5 First. Cf. Maj. Op. at 23-24.

The legislative history does indeed show that Congress was concerned with company unions and with employer interference with the *choice of representation*. See Maj. Op. at 22-23. But it is not at all clear why Board disentanglement of the impact of mergers on systemwide representation on its own initiative will tend to subject employees to such interference or control. The majority has not explained how employer requests interfere with the independent choice of employees to choose a preferred representative, except to imply that the carriers have absolute control over the timing of their requests and might choose to time their requests to disrupt (for example) one union's challenge to an incumbent. Maj. Op. at 22. But the assumption of power over timing is invalid. The Procedures require the merging carrier to "notify the NMB in writing *at the same time it files with the Interstate Commerce Commission for approval of its intent to merge.*" 17 NMB at 50 (emphasis added). And while the Procedures do allow carriers to "invoke the Board's services" after the ICC filing is complete, 17 NMB at 53-54, this would only occur in cases where the Board has not acted in response to the carrier's initial filing.

The majority's reading of § 2 Ninth sacrifices important purposes that Congress sought to achieve. As the Court in *General Committee* pointed out "[section 2, Ninth] was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees", 320 U.S. at 336, and that "[h]owever wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them", *id.* The Board has identified merger situations as among those commonly producing disputes falling within that range, and its use of carriers to identify these disputes in their early stages is not "clearly" outside the Board's expressly granted § 2 Ninth power to investigate and certify representatives in such instances.

Congress's rejection of the Eastman version of § 2 Ninth (designating carriers as parties to the dispute and legally *entitling* them to request Board investigation), see Maj. Op at 20-21, proves nothing about the Board's *discretion* to allow carriers to request Board intervention in specified circumstances. As *Railway Clerks* made clear, congressional refusal to order party status for carriers left "solely in the discretion of the Board" "[w]hether and to what extent carriers will be permitted to present their views on craft or class questions". 380 U.S. at 666-67. Had the Eastman bill passed, the Board would have been *required* to investigate at the behest of carriers and would have been investigating a different type of dispute – union-versus-carrier rather than union-versus-union. Congress's desire to prevent employer intrusion is not thwarted by the Board's adopting a policy of starting

investigations when carriers bring to its attention specific circumstances that in its experience are likely to produce potentially disruptive representation disputes.

Finally, the majority reads too much into legislative silence when it implicitly relies on the proposition that congressional specification of one thing – a duty to investigate an employee request – negates the alternative. The first difficulty is that the majority slides over the question of just what alternative may be negated. While it is quite reasonable to read the provision for employee request as a "limiting condition" for the Board's *duty* to investigate, see Maj. Op. at 19-20, it is quite another to infer negation of Board *authority* to investigate in response to carrier notice of mergers. The Court adopted precisely that distinction in *Railway Clerks* in holding that the Board was under no duty to allow carrier participation but was entitled to allow it and define its scope.

Legislative silence may, of course, reflect either a legislative decision to leave the issue unresolved or a failure to focus on the issue sharply. Where the issue arises in administration of a statute that Congress has confided to an agency, *Chevron* tells us how to read such a gap – as a matter to be resolved by the agency. See 467 U.S. at 843-44; *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991). See also *Cheney R.R. v. ICC*, 902 F.2d 66, 68-69 (D.C. Cir. 1990), and cases cited therein. Not surprisingly, this court has at times deemed legislative silence an insufficiently clear indication of Congressional intent to warrant *Chevron* deference. *Health Insurance Ass'n of America v. Shalala*, Slip Op. at 19 (May 13, 1994); *Central States Motor Freight Bureau, Inc. v. ICC*, 924 F.2d 1099, 1104-06 (D.C. Cir. 1991). In

some contexts, of course, a negative inference will make sense, as in the statute hypothesized in *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285, 1291-92 (D.C. Cir. 1989), aff'd by an equally divided court, 493 U.S. 38 (1989); a ban on importation of apples, oranges and bananas clearly manifests an intent not to bar grapefruit. But nothing in the language or history of this statute makes the omission here the proper basis of such an inference.

Where the scope of judicial review is, as here, even more limited, use of such negative inferences is exceptionally unjustifiable. In *Switchmen's/Leedom* review in the past we have rejected such an approach. In *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456 (D.C. Cir. 1989), we considered the Railway Labor Act's definition of "employee" – a "person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work," 45 U.S.C. § 151 Fifth – and refused to infer from its reference to *current* activity any actual requirement of current work; rather we upheld the Board's decision that former strikers not presently working could vote. "[N]either section purports to speak exclusively." *Id.* at 460. We also refused to draw negative implications from the contrast in wording between the RLA and the NLRA. See *id.* at 461. In both this case and *PCCA* there is statutory language that states something affirmative; in *both* the issue is whether that affirmative implies a negative. Structurally, the issues are just the same. See also *International Bhd. of Teamsters*, 402 F.2d at 201-03 (recognizing Board's implied power to refuse to certify, or to decertify,

representatives even though the statute authorized only identification and certification).

* * *

As the APA does not qualify the congressional preclusion of review of National Mediation Board decisions, and there is no principled way of singling out jurisdictional decisions for de novo review, I would apply the established principles of *Switchmen's/Leedom.* As I can find no "clear and mandatory" barrier to the Board's efforts to assure that existing certifications do not turn into violations of the systemwide representation rule, I would uphold its decision and affirm the district court's dismissal of the actions.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5223 & 91-5310 **September Term, 1994**

Railway Labor Executives' Association, et al.,
Appellants

v.

National Mediation Board, Appellee

Before: Mikva, *Chief Judge*, Wald, Edwards, Silberman, Williams, Ginsburg, Sentelle, Henderson and Randolph, *Circuit Judges*.

ORDER

(Filed Jul. 20, 1994)

It is ORDERED by the Court that the opinion of July 19, 1994 in the above entitled case is amended as follows:

On page 3, "Dissenting opinion filed by *Circuit Judge* Williams" should be amended to read:

Dissenting opinion filed by *Circuit Judge* Williams, with whom *Circuit Judges* Silberman, Ginsburg and Henderson join.

On page 1 of Judge Williams' dissent, the first line should be amended to read:

Williams, *Circuit Judge*, dissenting, in which Silberman, Ginsburg and Henderson, *Circuit Judges* join:

Per Curiam

For the Court

/s/ Ron Garvin
Ron Garvin, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*, Plaintiffs, v. NATIONAL MEDIATION BOARD, Defendant.	Civil Action No. 89-3306 (JHG) (Filed Jun. 10, 1991)

MEMORANDUM OPINION

Plaintiffs Railway Labor Executives' Association ("RLEA") and its affiliated labor organizations ("plaintiffs" or "Rail labor") initiated this action against National Mediation Board ("NMB" or the "Board"), seeking a declaration that the rules and regulations adopted by the NMB on November 27, 1989 are null and void and permanent injunctive relief enjoining the NMB from utilizing or enforcing the procedures set forth in the 1989 regulations. Specifically, plaintiffs contend that the NMB has exceeded its statutory authority in issuing the regulations and has violated the provisions of the Administrative Procedure Act ("APA"), in particular 5 U.S.C. § 553, and the Fifth Amendment of the Constitution. Plaintiffs, NMB, and intervenors Burlington Northern Railroad Company ("BN") and National Railway Labor Conference ("NRLC") have filed cross-motions for judgment on the pleadings and/or for summary judgment. For the

following reasons, defendants' motions are granted, and this case is dismissed.

I. BACKGROUND

According to the Complaint, on September 7, 1989, the Executive Director of the NMB transmitted to "Carriers and Labor Organizations in the Railroad Industry" a notice concerning "Merger Procedures in the Railroad Industry," to which was attached a draft of the proposed "Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry." The notice stated that the attached draft was submitted for written comments, not to exceed ten pages, and that the regulations were issued pursuant to "the Board's established authority under Section 2 Ninth of the Railway Labor Act ("RLA"), 45 U.S.C. Section 152 Ninth." Section 2 Ninth provides:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Mediation Board, it shall be the duty of the National Mediation Board, *upon the request of either party to the dispute*, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.

45 U.S.C. § 152 Ninth (emphasis added). The regulations promulgated pursuant to 45 U.S.C. § 152 provide, *inter alia*, that railroad "carriers" which have "merged," as that term is defined in the regulations, "may invoke the

Board's services for the determination of the post-merger status of any NMB certification on the applicable properties."

On September 28, 1989, Rail labor filed joint comments with the NMB concerning the rules and regulations proposed in the NMB notice of September 7, 1989. As an initial matter, plaintiffs objected to the NMB limitation on comments to ten pages. Plaintiffs also objected to the proposed regulations on the ground that the NMB had no statutory authority to adopt such regulations because the regulations provide for the creation, change, and termination of representation rights by the NMB without compliance with Section 2 Ninth. Specifically, plaintiffs contended that the RLA provides for the Board to investigate any dispute upon request of either party; that a carrier is not a party; and thus, that the NMB did not have general statutory authority to allow carriers to invoke the Board's services. On November 27, 1989, the NMB rejected the objections of plaintiffs and adopted the regulations with cosmetic changes.

I. DISCUSSION

In viewing a motion to dismiss or motion for judgment on the pleadings, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The factual allegations of the complaint must be presumed true and liberally construed in favor of plaintiff. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506 (D.C. Cir. 1984);

5A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1357, p. 304 (1990). The plaintiff is entitled to all favorable inferences which may be drawn from those allegations. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Summary judgment, in contrast, is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for trial – whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In considering a motion for summary judgment, the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. At the same time, however, Rule 56 places a burden on the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

As a preliminary matter, the NMB contends that the complaint should be dismissed because none of the claims is ripe; at the time the motions were filed, no applications requesting an investigation pursuant to the new procedures had been received by the NMB. Although NMB's argument that plaintiffs' claims are premature may have some merit, even assuming *arguendo* that plaintiffs' claims are ripe, this Court is without jurisdiction to decide this case.

Courts have acknowledged that jurisdiction to consider the legality of the Board's action is extraordinarily limited. Beginning with the decision in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 305 (1943), the Supreme Court has consistently held that Congress has committed the responsibility for protecting workers' representation rights exclusively to the Board and that "[t]here was to be no dragging out of the controversy into other tribunals of law." Accordingly, courts have authority to review Board decisions only upon a " 'showing on the face of the pleadings that the certification decision was a gross violation of the Railway Labor Act or that it violated the constitutional rights of an employer, employee, or union.' " *International Ass'n of Machinists & Aerospace Workers v. Trans World Airlines*, 839 F.2d 809, 811 (D.C. Cir.), *cert. denied*, 109 S. Ct. 62 (1988) (citations omitted). As the Court of Appeals for the District of Columbia Circuit recently recognized, "Judicial review of NMB decisions is extraordinarily limited. . . . Courts take only a 'peek at the merits' to determine if the NMB has committed an error of 'constitutional dimension or gross violation of the statute.' . . . The court is empowered to proceed no further unless the 'peek' reveals an error that is 'obvious on the face of the papers . . . without extension to "arguing in terms of policy or broad generalities as to what the Railway Labor Act should provide." ' " *Professional Cabin Crew Ass'n v. National Mediation Board*, 872 F.2d 456, 459 (D.C. Cir. 1989) (citations omitted).

Plaintiffs contend that this case involves acts of the NMB that "patently" exceed the limited statutory jurisdiction provided to the Board by Section 2 Ninth because in issuing the regulations, the Board unilaterally

expanded its investigative and certification authority when it authorized a carrier to initiate Section 2 Ninth proceedings where there was no "dispute . . . among [that] carrier's employees as to who are the representatives of such employees." Because of their contention that there has been a flagrant violation of the RLA, plaintiffs urge the Court to exercise jurisdiction over the cause. The Court cannot agree.

Although plaintiffs contend that "the Board has inserted words into Section 2 Ninth which Congress chose to omit from the statute,"[1] thereby enlarging the NMB's discretion, it appears that plaintiffs, instead, would insert the word "only" in Section 2 Ninth. As plaintiffs argue, "Congress specifically authorized NMB to conduct elections to determine and certify employees' collective bargaining representatives *only* '[i]f any dispute shall arise among a carrier's employees as to who are the representatives of such employees.' " Plaintiffs' Memo, at 5 (emphasis in original).

The cited provisions, however, do not impose a clear and mandatory duty on the Board to refrain from investigating in the wake of a carrier's request. Although the Act clearly requires the Board to investigate "upon request of either party," it does not forbid the Board from

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[1] Plaintiffs' Memorandum of Points and Authorities in Support of Cross-Motion for Judgment on the Pleadings or for Summary Judgment and in Opposition to Defendants' Motions to Dismiss, for Summary Judgment and for Judgment on the Pleadings ("Plaintiffs' Memo"), at 4.

investigating in other circumstances.[2] In fact, Section 2 First states unambiguously, "It shall be the duty of all carriers . . . and employees to exert every reasonable effort . . . to settle all disputes." As Judge Gesell concluded in a similar case, plaintiffs' "citation of these provisions creates a dispute 'in terms of policy and broad generalities as to what the Railway Labor Act should provide.' " *Railway Labor Executives' Ass'n v. National Mediation Board*, Civil Action No. 89-3306, slip op. at 5 (D.D.C. January 9, 1990). Absent a specific, clear statement that the Board shall not investigate *except* upon the request of an employee or representative, the Court lacks jurisdiction to imply such a requirement; this is precisely the kind of dispute that is within the unreviewable discretion of the NMB.[3]

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[2] The fact that a carrier has never been considered a "party" pursuant to Section 2 Ninth's provision that NMB may investigate a dispute "upon request of either party" does not affect the analysis. A carrier need not be considered a party to the dispute for this Court to find that a carrier is not explicitly excluded from participation under the RLA.

[3] Although plaintiffs appear to assert in their Complaint a violation of the APA and of the Fifth Amendment of the Constitution, in their opposition to defendants' motions, they only argue that the "issue before this Court [involves] whether the NMB exceeded its statutory authority in providing railroads such unprecedented involvement in their employees' representation." Plaintiffs' Memo, at 3. In any event, having taken a "peek" at the merits, plaintiffs could not have maintained a cause of action based on either the APA or the due process clause. First, the APA does not confer jurisdiction to review agency actions where the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (2). Second, although the NMB imposed a page limitation, it also offered all interested

III. CONCLUSION

Accordingly, for the reasons expressed above, it is hereby ORDERED that this case is dismissed.

IT IS SO ORDERED.

June 4, 1991.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

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parties an opportunity to be heard before issuing the regulations. Moreover, a carrier's request to the NMB would invoke an investigation, not an immediate decision.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*, Plaintiffs, v. NATIONAL MEDIATION BOARD, Defendant.	Civil Action No. 89-3306 (JHG) (Filed Jul. 03, 1991)

ORDER

On June 10, 1991, the Court issued a Memorandum Opinion granting defendant National Mediation Board's ("NMB") motion for summary judgment and dismissing the complaint. On June 20, 1991, plaintiffs Railway Labor Executives' Association ("RLEA") and eighteen labor organizations filed a motion to alter judgment or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In addition, RLEA requested an extension until July 10, 1991, in order to file a supplemental memorandum to their motion. For the following reasons, plaintiffs' motions are denied.

As defendants point out, "[F]urther discussion in a supplemental memorandum would be equivalent to beating a dead horse." Memorandum of Points and Authorities by Intervenor-Defendant National Railway Labor Conference in Opposition to Plaintiff's Motions to Alter or Amend Judgment and for Leave to File Supplemental

Memorandum in Support Thereof, at 5. Plaintiffs have filed a four-page memorandum and two-page motion that clearly set forth plaintiffs' position.

In addition, plaintiffs' motion to alter or amend judgment, in effect, seeks reconsideration of this Court's June 10, 1991 decision. However, plaintiffs' fail to advance a single argument to persuade the Court that it erroneously concluded that the scope of this Court's jurisdiction to review the NMB's merger decision is limited. In reaching its decision, the Court considered a long line of authorities, including many decisions by the Supreme Court and our Court of Appeals, which decisions compelled the Court to conclude that this is precisely the kind of dispute that is within the unreviewable discretion of the NMB.

Plaintiffs' attempt now to draw upon legislative history is equally unpersuasive. The fact that Congress did not enact a bill specifically giving the NMB jurisdiction to investigate a dispute between a carrier and group of its employees does not mean that a merged carrier cannot invoke the jurisdiction of the NMB to investigate disputes among its employees to determine who shall be certified (if anyone) to represent a merged craft or class of employees.

Accordingly, for the reasons expressed above, it is hereby

ORDERED that plaintiffs' motion for leave to file a supplemental memorandum in support of motion to alter or amend judgment is denied; it is

FURTHER ORDERED that plaintiffs' motion to alter or amend judgment is denied.

IT IS SO ORDERED.

July 3, 1991.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*, Plaintiffs, v. NATIONAL MEDIATION BOARD, Defendant.	Civil Action No. 91-1135 (JHG) (Filed Sep. 12, 1991)

ORDER

On May 16, 1991, plaintiffs Railway Labor Executives' Association ("RLEA") and its affiliated labor organizations ("plaintiffs" or "Rail labor") initiated this action against the National Mediation Board ("NMB" or the "Board"),[1] seeking a declaration that the NMB exceeded its statutory authority under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, when it issued its April 23, 1991 decision, *Burlington Northern Railroad Company*, 18 NMB 240 (1991), in which the Board asserted jurisdiction over all crafts or classes on the BN, and no labor

[1] On July 10, 1991, the Court granted Burlington Northern Railroad Company's ("BN") unopposed motion for leave to intervene as a defendant.

organization or employee "showing the requisite interest"[2] had requested its services or asserted that a representational dispute existed. The instant action was filed under Local Rule 405(a)(3) as a related case to *Railway Labor Executives' Association v. National Mediation Board*, Civil Action No. 89-3306, which action was dismissed on June 10, 1991.

Plaintiffs, NMB, and BN have now filed cross-motions for judgment on the pleadings and/or for summary judgment. The parties agree, however, that "[t]he issues presented by this case are identical to those decided by this Court on June 10, 1991 in *Railway Labor Executives' Association, et al. v. National Mediation Board*, Civil Action No. 89-3306 (JHG) (D.D.C.). Because no new issues are presented by the pending litigation, the parties have agreed to the Stipulated Recorded [sic] filed in conjunction with this motion[,] and the parties have agreed to dispense with the necessity of filing memoranda in support of motions as well as with the necessity of filing oppositions or replies."[3] Motion of

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[2] Complaint, at 12.

[3] Plaintiffs have also filed a motion to strike attachments to the motion for judgment on the pleadings or, in the alternative, for summary judgment filed by BN. Plaintiffs contend that "the Stipulated Record is an agreement among the parties as to what constitutes the record in this proceeding and is an integral element in the parties agreement to dispense with the necessity of filing memoranda, oppositions, and replies." Plaintiffs' Motion and Memorandun [sic] in Support of Motion to Strike Attachments to the Motion for Judgment on the Pleadings, or in the Alternative, for Summary Judgment Filed by Burlington Northern Railroad Company ("Plaintiff's Motion to Strike"), at 2. BN argues, however, that petitions for clarification of NMB's

Defendant National Mediation Board to Dismiss or, in the Alternative, for Summary Judgment ("NMB's Motion"), at 2. The Stipulated Record includes pleadings that were submitted in Civil Action No. 89-3306.

In dismissing Civil Action No. 89-3306, the Court concluded, "Absent a specific, clear statement that the Board shall not investigate *except* upon the request of an employee or representative, the Court lacks jurisdiction to imply such a requirement; this is precisely the kind of dispute that is within the unreviewable discretion of the NMB." Civil Action No. 89-3306, Memorandum Opinion, June 10, 1991, at 7 (emphasis in original). Similarly, in the instant action, because judicial review of NMB decisions is extremely limited, this Court lacks jurisdiction to review the merger procedures that were promulgated by NMB and that permit carriers to invoke NMB's authority to investigate representation disputes.

Accordingly, for the reasons expressed above, in the Memorandum Opinion issued in Civil Action No. 89-3306, and in the July 3, 1991 Order denying plaintiffs'

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decision "are clearly part of the Stipulated Record even though they were not attached." Burlington Northern Railroad Company's Response to the Railway Labor Executives' Association, *et al.*'s Motion to Strike Attachments to Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment Filed by Burlington Northern Railroad Company ("BN's Opp. to Motion to Strike"), at 1.

BN's argument is unavailing. The parties entered into an agreement as to what would constitute the full record in this case. BN cannot circumscribe such an obligation by contending that the additional materials are important, relevant, public documents. Accordingly, plaintiffs' motion to strike attachments shall be granted.

motion to alter judgment issued in Civil Action No. 89-3306, it is hereby

ORDERED that plaintiffs' motion to strike attachments to the motion for judgment on the pleadings or, in the alternative, for summary judgment filed by Burlington Northern Railroad Company is granted; it is

FURTHER ORDERED that defendant National Mediation Board's motion to dismiss or, in the alternative, for summary judgment is granted; it is

FURTHER ORDERED that intervenor-defendant Burlington Northern Railroad Company's motion for judgment on the pleadings or, in the alternative, for summary judgment is granted; it is

FURTHER ORDERED that plaintiffs' motion for summary judgment is denied; and it is

FURTHER ORDERED that this case is dismissed.

IT IS SO ORDERED.

September 12, 1991. /s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

(Seal) NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

Procedures for Handling Representation Issues Resulting From Mergers, Acquisitions or Consolidations in the Railroad Industry	:	17 NMB No. 13 File No. C-6230 PROCEDURES November 27, 1989

PREAMBLE

In *Trans World Airlines/Ozark Airlines*, 14 NMB 218 (1987), the Board established "interim procedures" for handling representation issues resulting from airline mergers, acquisitions or consolidations. The Board, in *Missouri Pacific Railroad (Union Pacific)*, 15 NMB 95 (1988), applied these "interim procedures" to the railroad industry. In that decision, the Board also announced its intention to revise its merger procedures for the railroad industry.

These procedures are issued pursuant to *Missouri Pacific, supra*, and the Board's established authority under Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. §152, Ninth.[1]

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[1] Pursuant to *Missouri Pacific, supra*, the Board distributed a draft of its procedures to railroad and union officials for comment. The Board received twenty-four timely responses. These comments were carefully considered by the Board.

The Board will utilize its traditional investigatory procedures to determine the facts relevant to the many variations of railroad mergers and acquisitions. The Board will ensure that such mergers and acquisitions are not in derogation of employee rights under Section 2, of the Railway Labor Act.

The NMB is vested with the final decision-making authority over representation issues. The merging or acquiring carriers are responsible for keeping the NMB fully informed. The carriers' actions decide and shape the nature and scope of the change in corporate structure and organization. The carriers also determine the timing involved. The Board's efforts will be advanced by prompt and complete submission of information concerning relevant developments and the reasons involved.

The merger procedures are issued pursuant to the Board's established authority under 45 U.S.C. §152, Ninth, to investigate and determine who shall represent employees in the event of a dispute. In most cases, the initiating carriers contemplate the creation of a single transportation system. This decision, when communicated to the Board in advance of a merger date, will invoke the Board's rules on single carrier status which may affect representation rights. Further, in operational mergers, these procedures affirmatively provide that carriers involved can invoke the Board's services for a determination of the post-merger status of any NMB certifications. This investigatory approach is consistent with the NMB's merger policies as further expressed, *inter alia*, in *Trans World Airlines/Ozark, supra,* and *Missouri Pacific Railroad (Union Pacific), supra.*

Mergers often lead to significant changes in carriers' size, nature, management, work force and labor relations. In particular, changes relate to the size, composition and functions of the employee work force. These changes affect the craft or class designations. In recognition of this, the Board has expanded the labor organizations' ability to raise questions of representation in instances involving mergers and acquisitions. *See, for example, Northwest Airlines,* 13 NMB 399 (1986); *Midway Airlines, Inc.,* 14 NMB 447 (1987); *Trans World Airlines/Ozark,* 14 NMB 218 and 14 NMB 343 (1987); *British Airways/British Caledonian Airways,* .16 NMB 17 (1988); *American Airlines, Inc.,* 16 NMB 99 (1988); and *National Railroad Passenger Corporation (Amtrak),* 13 NMB 412 (1986). Consistent with that expansion and the reasons for it, the Board may permit carriers to invoke the Board's merger procedures.

In certain cases, a merger may have already occurred. The Board recognizes that there may be continuing representation questions despite the fact that the merger may have already occurred. When there has been major change in the actual operations of a railroad system, craft or class changes also occur. A question as to who is the authorized or designated representative is also likely to arise. The Board cannot ignore these changes under Section 2, Ninth, of the Act where certain criteria are met.

It is the Board's longstanding practice in keeping with its statutory mandate to certify only unions that represent the majority of a system-wide class of employees. *Seaboard System Railroad-Clinchfield Line,* 11 NMB 217 (1984); *Missouri Pacific, supra; CSX Transportation,* 15 NMB 129 (1988); *Central of Georgia Railroad (Norfolk Southern Corp. Subsidiaries),* 16 NMB 5 (1988); *Ogden*

Union Railway and Depot Company, 16 NMB 398 (1989); *USAir/Piedmont Aviation,* 16 NMB 412 (1989); *Federal Express/Flying Tigers,* 16 NMB 433 (1989); *British Airways/ British Caledonian Airways,* 16 NMB 17 (1988); *American/ AirCal,* 14 NMB 379 (1987); *Delta/Western,* 14 NMB 291 (1987); *TWA/Ozark, supra; Northwest,* 13 NMB 399 (1986); *Republic/Hughes Airwest,* 8 NMB (1980); and *Summit Airlines Inc. v. Local 295,* 628 F.2d 787 (2d Cir. 1980). Furthermore, the necessary system-wide nature of Railway Labor Act crafts or classes is well-established in the railway industry.

In *Summit,* the United States court of Appeals for the Second Circuit found a representation dispute to exist in circumstances where there were doubts about system-wide representation and without the filing of a form NMB-3, "Application for Investigation of Representation Dispute." The court recognized that: "the NMB deems the dispute requirement of Section 2, Ninth satisfied . . . if some employees are indifferent or hostile to being represented. . . . " 628 F.2d at 793, note 3. Accordingly, the Second Circuit concluded: "[b]ecause it is apparent that [the organization] does not represent the majority of a craft or class of Summit's employees . . . the requirement of a dispute is met, and its resolution is for the National Mediation Board." *Id.*

The United States Court of Appeals for the Fifth Circuit reached a conclusion consistent with *Summit* in *International Brotherhood of Teamsters v. Texas International Airlines, Inc.,* 717 F.2d 157, 159 (5th Cir. 1983); "[a] representation dispute may occur even if only one union claims to represent the employees if there is a question whether a majority of the craft or class desires the union's

representation." Significantly, *Texas International* was decided by the Fifth Circuit in the context of an operational merger between two carriers where no representation application had been filed.

Mergers that contemplate separate carrier status do not involve these rules but also may affect representation rights. Mergers may contemplate separate carriers but, in fact, be a single carrier. In that case, these rules apply. Accordingly, the NMB will require information on a continuing basis related to such operations to determine whether the separate status continues in fact and/or whether representation rights of employees have been affected.

Any creation, change, termination or extension of representation rights pursuant to NMB certification action is solely within the province and is the affirmative responsibility of the Board under the Railway Labor Act. The Board intends to carry out its responsibilities through these procedures to resolve representation disputes which arise from mergers.

The case law is now established beyond reasonable contradiction that the National Mediation Board has plenary authority with respect to the impact of corporate mergers, acquisitions and consolidations on NMB representation certifications. For example, the U.S. Court of Appeals for the Second Circuit in *Air Line Pilots Association v. Texas Int'l Airlines, Inc.*, 656 F.2d 16, 22 (2d Cir. 1981), concluded that "the NMB is empowered to, and has shown itself able, to decide representation disputes arising out of corporate restructurings. . . . As the district court found, the NMB 'has shown itself alert to prevent

carriers from frustrating representation rights by artful corporate devices.' " Further, in *Association of Flight Attendants v. Delta Air Lines, Inc.*, No. 87-7040 (D.C. Cir. July 18, 1989), slip op. 13, the U.S. Court of Appeals for the District of Columbia Circuit recently concluded:

> All of the courts of appeals to have considered the issue . . . have held that the question whether a union's certification survives [a] . . . merger is a matter within the exclusive jurisdiction of the NMB. *See, International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir. 1976); *Air Line Pilots Ass'n v. Texas Int'l Airlines, Inc.*, 656 F.2d 16, 23-24 (2d Cir. 1981); *International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 159 (5th Cir. 1983); *Brotherhood of Ry. Clerks v. United Airlines, Inc.*, 325 F.2d 576, 579-80 (6th Cir. 1963); *Air Line Employees Ass'n v. Republic Airlines, Inc.*, 798 F.2d 967, 968-69 (7th Cir. 1986).

It is equally well established that with respect to those matters subject to the Board's comprehensive authority, the determination of the particular investigative approach to be utilized is wholly within the NMB's discretion. As the Supreme Court found in *Railway Clerks v. Non-Contract Employees*, 380 U.S. 656, 662 (1965), "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ. . . . " The only limitation on the Board's authority with respect to such investigations are actions "made in excess of its delegated powers and contrary to a *specific prohibition* in the Act." *Id.* 380 U.S. at 659-660 (Emphasis in original).

Given the applicable "specific prohibition" standard, it is evident that the Railway Labor Act may not be construed so as to limit the Board's investigative discretion with respect to the participation of carriers in NMB investigations generally. Correspondingly, neither may the statute be construed to limit the NMB's discretion with respect to the particular extent or nature of the carriers' role in the NMB's merger investigations. Accordingly, in view of the lack of any such "specific prohibition" in the Act, those questioning the Board's authority to afford selective "standing" or other status to carriers in NMB merger investigations are limited to "arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide." *Railway Clerks*, 380 U.S. at 671. However, "it was to avoid the haggling and delays of litigation that such [policy] questions were left to the Board." *Id. See also, International Brotherhood of Teamsters v. Railway Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968). These procedures reflect the Board's exercise of its plenary discretion over just such policy matters. The Board anticipates the full cooperation of the carriers and organizations involved.

While these procedures will be applied verbatim in most situations, there may be instances in which special applications are necessary. In fulfilling its responsibilities under Section 2, Ninth, of the Railway Labor Act, the Board must retain such flexibility to appropriately investigate and apply its procedures to different situations which may arise in the future.

SUBPART A – GENERAL PROVISIONS

1) DEFINITIONS

a) The term "merger" as used herein shall mean a consolidation, merger, purchase, lease, operating contract, acquisition of control or similar transactions.

b) The term "carrier" means a carrier as defined in the Railway Labor Act, 45 U.S.C. §151.

c) The term "organization" means a labor organization and representative as provided by Section 1, Sixth, 45 U.S.C. §151, Sixth, and Section 2, Ninth, 45 U.S.C. §152, Ninth of the Act.

2) APPLICABILITY OF THESE PROCEDURES

These procedures, effective upon the date of issuance, shall apply to all organizations and carriers which may be affected by a merger that has occurred or may occur in the future.

SUBPART B – SINGLE TRANSPORTATION SYSTEM

1) FILINGS WITH NMB

a) The carrier will notify the NMB in writing at the same time it files with the Interstate Commerce Commission for approval of its intent to merge. The submission to the NMB shall include a complete copy of the carrier's merger application to the Interstate Commerce Commission.

b) Carriers which have previously merged may notify the NMB that the merger had occurred. The submission to the Board shall include a statement of the date the merger occurred and the carriers involved in the merger.

2) MERGER INVESTIGATION

The NMB's investigation shall take the form required by the circumstances such as: interrogatories; document requests; on-site investigations; or hearings. The Board's merger investigation will determine whether the carriers will operate or is presently operating as a single transportation system. Applicable decisions regarding such investigations include but are not limited to *Seaboard System Railroad-Clinchfield Line*, 11 NMB 217 (1984); *Missouri Pacific, supra; CSX Transportation*, 15 NMB 129 (1988); *Central of Georgia Railroad (Norfolk Southern Corp. Subsidiaries)*, 16 NMB 5 (1988); *Ogden Union Railway and Depot Company*, 16 NMB 398 (1989); *USAir/Piedmont Aviation*, 16 NMB 412 (1989); *Federal Express/Flying Tigers*, 16 NMB 433 (1989); *British Airways/British Caledonian Airways*, 16 NMB 17 (1988); *American/AirCal*, 14 NMB 379 (1987); *Delta/Western*, 14 NMB 291 (1987); *TWA/Ozark, supra; Northwest*, 13 NMB 399 (1986); and *Republic/Hughes Airwest*, 8 NMB 49 (1980).

3) MERGER DECISION

a) After investigation, the Board will issue a decision concerning the status of the certifications on the merged carrier. Findings

concerning the craft or class lines at the merged carrier may also be appropriate.

b) Where the Board finds that the certification(s) on the acquired carrier should terminate, such termination(s) will be effective on or after the date of the Board decision.

4) REPRESENTATION APPLICATIONS FROM INCUMBENT LABOR ORGANIZATIONS

a) Incumbent organizations on the affected carriers will be allowed, absent unusual or extraordinary circumstances, sixty days from the above-described decision to file a representation application supported by a showing of interest of no less than 35% of the combined craft or class.

b) Evidence of showing of interest from incumbent organizations on the affected carriers may be comprised of, wholly or in part, authorization cards, dues check-off authorizations or seniority lists with a carrier involved in the merger.

c) All other representation applications will be subject to the standard showing of interest requirements contained in the Board's Regulations at 29 CFR §§1206.2 and 1206.5.

d) Failure to meet the above described 35% showing of interest requirement by an incumbent organization will result in dismissal. Such dismissal or withdrawal of an application will not act to impose the one year election bar contained in the Board's Regulations at 29 CFR §1206.4.

5) ELECTIONS

Elections authorized pursuant to Subpart B will be given priority and progressed expeditiously through the balloting process and the final representation decision. In addition to elections under Subpart B(4), the Board may authorize elections based on the special circumstances of the particular case before the Board, including, *inter alia*, comparability of craft or class size.

6) SUBSEQUENT REPORTING TO NMB

The Board may require carriers and organizations to inform it in writing of post-merger developments.

SUBPART C – SEPARATE TRANSPORTATION SYSTEMS

1) FILINGS WITH NMB

The carrier will notify the NMB in writing at the same time it files with the Interstate Commerce Commission for approval of its intent to merge. The submission to the NMB shall include a complete copy of the carrier's merger application to the Interstate Commerce Commission.

2) NMB INQUIRY

The Board's inquiry will request from the carriers and organizations appropriate information concerning the separate transportation system.

3) CONTINUING DUTY TO REPORT

The Board may require carriers and organizations to inform it in writing of subsequent developments.

SUBPART D – MERGER OF OPERATIONS AT A LATER DATE

1) FILINGS WITH NMB

Carriers maintaining separate transportation systems, which subsequently seek to complete a merger of operations, shall notify the NMB at the earliest practicable date prior to the operational merger.

2) APPLICABILITY OF SUBPART B

Such cases shall be handled pursuant to the procedures established herein dealing with single carrier status at Subpart B, paragraphs 1-6.

SUBPART E – SUPPLEMENTARY MATTERS

1) CARRIER INVOCATIONS

Consistent with *Missouri Pacific, supra,* at 15 NMB 110-111, carriers which have satisfied the filing requirements of Subpart B (1) may invoke the Board's services for a determination of the post-merger status of any NMB certifications on the applicable properties.

2) COMMENTS FROM INCUMBENT ORGANIZATIONS

Incumbent organizations on the affected carriers may make relevant comments to the NMB in writing concerning the carriers' submission and any other pertinent matters.

3) DISTRIBUTION OF INFORMATION

Carriers and organizations must provide other participants with copies of each submission to the NMB by verified certificate of simultaneous service signed by counsel.

4) PUBLIC INFORMATION

The information submitted to the Board by carriers and organizations will be public information subject to the provisions of the Freedom of Information Act.

5) ADMINISTRATIVE FILE NUMBERS

a) Representation applications filed by incumbent organizations pursuant to Subpart B, paragraph 4, will be assigned a file number in the MR-series.

b) Carrier invocations of the Board's services pursuant to Subpart E, paragraph 1, will be assigned a file number in the MT-series.

c) All other submissions under these procedures will be assigned a file number in the M-series.

SUBPART F – EFFECT OF PROCEDURES

1) NO EFFECT OF PROCEDURES ON VOLUNTARY RECOGNITION AGREEMENTS, COLLECTIVE BARGAINING AGREEMENTS OR PROGRESSION OF GRIEVANCES

a) These procedures are not a bar to the effectuation of voluntary recognitions otherwise permissible under the Act. *See, TWA/Ozark,* 14 NMB 218 at 234 (1987); *Republic Airlines,* 6 NMB 817 (1979); *Braniff/Florida Express,* 15 NMB 294 (1988); *USAir/Piedmont, supra;* and *Federal Express/Flying Tiger, supra.*

b) These procedures shall have no effect on the survival of existing collective bargaining agreements.

c) These procedures shall not act to inhibit the processing of pending grievances otherwise permissible under the Act. *See, Delta/Western,* 14 NMB 291 at 302 (1987).

2) NO CHANGE IN EXISTING RIGHTS UNDER THE RAILWAY LABOR ACT

Existing rights under the Railway Labor Act shall not be enhanced or diminished by these procedures. For example, the Board recognizes that when a dispute involves the interpretation or application of a railroad collective bargaining agreement, Section 3 of the Railway Labor Act, 45 U.S.C. §153, provides that it be referred to an appropriate adjustment board for resolution through arbitration. It is further understood that nothing in these procedures may be construed to require any particular

internal collective bargaining structure on the part of any representative under the Act.

By direction of the NATIONAL MEDIATION BOARD.

/s/ Charles R. Barnes
Charles R. Barnes
Executive Director

cc: All unions and
carriers in the
railroad industry.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5223 September Term, 1992
CA 89-03306

Railway Labor Executives' Association, et al.,

Appellants

v.

National Mediation Board, et al.

Appellees

and Consolidated Case No. 91-5310

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

(Filed July 23, 1993)

Appellees' Suggestions For Rehearing *en banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestions. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions are granted and these matters will be reheard by the Court sitting *en banc*.

It is FURTHER ORDERED, by the Court *en banc*, that the judgment of the court filed herein on March 9, 1993, is hereby vacated.

A future order will govern further proceedings.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Buckley did not participate in this matter.

Nos. 94-890, 94-907

In the Supreme Court of the United States

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

NATIONAL RAILWAY LABOR CONFERENCE,
PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
RESPONDENTS

BURLINGTON NORTHERN RAILROAD COMPANY,
PETITIONER

v.

NATIONAL RAILWAY LABOR EXECUTIVES' ASSOCIATION,
ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE REGIONAL AIRLINE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-890

NATIONAL RAILWAY LABOR CONFERENCE,
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v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
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BURLINGTON NORTHERN RAILROAD COMPANY,
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v.

NATIONAL RAILWAY LABOR EXECUTIVES' ASSOCIATION,
ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE REGIONAL AIRLINE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

This brief is submitted by the Airline Industrial Relations Conference ("Aircon") and the Regional Airline Association ("RAA"), as *amici curiae* in support of the petitioners.[1]

[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court concurrently with this brief.

INTERESTS OF AIRCON AND RAA AS AMICI CURIAE

Aircon is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues, and to represent its member carriers in these areas with respect to legislative, judicial and administrative matters. Its carrier members include most major and national scheduled air carriers in the United States.

The Regional Airline Association is a trade organization whose members are engaged in scheduled air transportation of passengers and cargo in short-haul markets throughout the United States and its territories. The RAA is chartered to promote a healthy business climate for the growth of regional airlines by working with appropriate legislative and regulatory bodies and with the public, the press and other organizations, on issues affecting the industry. In 1992, RAA members transported approximately 93 percent of all regional airline passengers.

Aircon, the RAA and their member air carriers have a substantial interest in this case.[2] The *en banc* decision of the lower court concludes by the barest majority (5 to 4) that the National Mediation Board ("NMB" or the "Board") lacked statutory authority under the Railway Labor Act ("RLA") to promulgate its *Railroad Merger Procedures*.[3] The decision therefore implicates the Board's counterpart *Airline Merger Procedures*[4] which apply to

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[2] The decision of the *en banc* panel of the lower court is reported as *Railway Labor Exec. Ass'n v. National Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) and is also appended to Petitioner Burlington Northern Railroad Company's petition for writ of certiorari at pages 1a through 62a.

[3] *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions, or Consolidations in the Railroad Industry*, 17 NMB 44 (1989).

[4] *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions, or Consolidations in the Airline Industry*, 14 NMB 388 (1987).

Aircon's and RAA's member carriers.[5] Since the 1987 inception of the merger procedures, the Board has decided more merger cases under the *Airline Merger Procedures* than the *Railroad Merger Procedures* because of the greater frequency of such transactions in the airline industry.[6]

The *Airline Merger Procedures* are critical in the airline industry because they establish a reasoned and well-ordered procedure under which the Board will review and update its previous representation determinations (known as "certifications") regarding the unions that will represent employee groups (known as "crafts or classes"), in the wake of mergers or other transactions that change a carrier's corporate identity or structure. Because of the frequency of transaction-driven changes affecting union representations in the heavily-unionized airline industry, the *Airline Merger Procedures* have played a central role in avoiding labor strife and related litigation in this vital transportation industry.

Aircon and RAA fully support the positions taken by Petitioners National Railway Labor Conference ("NRLC") and Burlington Northern Railroad Company ("BN") with regard to the *Railroad Merger Procedures.* Neither of those entities, however, is an air carrier, or represents air carriers, or can speak directly to the particularly destabilizing impact on the airline industry of judicial invalidation of the *Airline Merger Procedures.* Aircon and RAA, therefore, respectfully submit that because of its potential impact on the airline industry, the *en banc* decision invalidating the parallel *Railroad Merger Procedures*

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[5] The *Railroad Merger Procedures* were developed by the Board in 1989 based on the *Airline Merger Procedures* developed earlier in 1987. *Railroad Merger Procedures*, 17 NMB at 44. An earlier challenge to the *Airline Merger Procedures* on similar grounds of NMB authority was rejected. *International Brotherhood of Teamsters v. NMB*, 118 Lab. Cas. (CCH) ¶ 10,678 (D.D.C. 1990).

[6] *See* Note 7 *infra.*

presents an important question of federal law within the meaning of Rule 10.1(c) of this Court.

ARGUMENT

I. THE *EN BANC* DECISION WILL HAVE A DESTABILIZING EFFECT ON LABOR RELATIONS IN THE AIRLINE INDUSTRY.

It is not hyperbole to state that judicial invalidation of the *Airline Merger Procedures* would be a prescription for chaos in airline labor relations. Indeed, Judge Williams in his dissent below, cited the destabilizing impact of the majority's decision on the airline industry as Aircon and the RAA had argued as *amici* below:

> [I]nvalidation of the merger procedures would likely place a cloud over the status of the certifications, voluntary recognitions, and revocation of certifications resulting in [previously decided applications], and could result in unnecessary litigation and disrupt the stable post-merger collective bargaining relationships now in place.
>
> The destabilizing impact of the loss of the merger procedures would be even more significant in the future. . . .
>
> [Before the merger procedures, carrier decisions made without NMB clarification] frequently resulted in unresolved disputes, litigation and potential disruptions of airline operations.

29 F.3d at 675; BN petition at 46a.

This Court has long recognized that questions of whether one union or another union is the proper representative of a group of employees is "an explosive problem." *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 303 (1943). Partly as the result of the 1978 deregulation of the airline industry, there has been a proliferation of mergers and other cor-

porate transactions that continually raise RLA representation questions. Many of the most difficult labor disputes in the post-deregulation airline industry have involved the impact of corporate transactions on union representation and collective bargaining.

The Board reacted to this proliferation of merger-related representation disputes with its decision in *TWA/Ozark*, 14 NMB 218 (1987). That decision clarified the Board's policies with respect to the effect of mergers on existing union certifications and established interim "merger procedures," which were formalized in the *Airline Merger Procedures* that same year. *Airline Merger Procedures*, 14 NMB 388 (1987). Both the interim and final procedures mandated *carrier notice* to the Board concerning pending transactions, so the Board could *sua sponte* determine the impact of the transaction on existing NMB certifications.

Under *TWA/Ozark* and the *Airline Merger Procedures*, the Board has been remarkably successful in resolving potentially divisive representation disputes that invariably arise from corporate mergers or similar transactions. The Board has decided 16 airline industry merger cases since 1987.[7] Those 16 cases have resolved the representation of almost 100 different crafts or classes on the industry's largest airlines—American, Delta, Federal Express, TWA, and USAir.

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[7] *USAir/Shuttle, Inc.*, 19 NMB 388 (1992); *Pennsylvania Airlines/Allegheny Commuter*, 19 NMB 362 (1992); *SAHSA/TAN*, 19 NMB 17 (1991); *Command Airways/Nashville Eagle*, 18 NMB 372 (1991); *Air Wisconsin/Aspen Airways*, 18 NMB 336 (1991); *Federal Express/Flying Tiger Line*, 16 NMB 433 (1989); *Metroflight/Chaparral Airlines*, 18 NMB 56 (1990); *USAir/Piedmont*, 16 NMB 412 (1989); *British Airways/British Caledonian Airways*, 16 NMB 17 (1988); *Braniff/Florida Express*, 15 NMB 294 (1988); *USAir/PSA*, 15 NMB 135 (1988); *Alaska Air/Jet America*, 15 NMB 42 (1987); *Midway Airlines/Air Florida*, 14 NMB 447 (1987); *Delta Airlines/Western Airlines*, 14 NMB 291 (1987); *American Airlines/Air California*, 14 NMB 379 (1987); *TWA/Ozark*, 14 NMB 218 (1987).

Most merger-related representation disputes have been resolved by the Board determining which of the existing, pre-merger union certifications apply to the new, post-merger carrier. Minority unions have had their certifications terminated by the Board only where the union was unable to demonstrate sufficient employee support among the combined, post-merger craft or class. *See, e.g., Delta/Western,* 14 NMB 291 (1987). Where the size of merging workforces have been comparable, the Board has deferred action on existing certifications pending an election to determine the majority representative. *See, e.g., Federal Express/Flying Tiger,* 16 NMB 433 (1989); *USAir/Piedmont,* 16 NMB 412 (1989). As the 16 cases illustrate, the Board has used the *Airline Merger Procedures* to resolve live representation disputes, arising among employees, concerning who is the majority representative of the combined craft or class of employees under Section 2 Fourth of the Act, 45 U.S.C. § 152 Fourth.

Prior to the NMB's promulgation of the *Airline Merger Procedures,* representation disputes in the airline industry had proliferated in the federal courts. *See, e.g., Air Line Employees Ass'n v. Republic Airlines, Inc.,* 798 F.2d 967 (7th Cir.), *cert. denied,* 479 U.S. 962 (1986); *Int'l Broth. of Teamsters v. Tex. Int'l Air,* 717 F.2d 157 (5th Cir. 1983); *Air Line Pilots Ass'n v. Texas Int'l Airlines, Inc.,* 656 F.2d 16 (2d Cir. 1981); *Int'l Ass'n of Machinists v. Northeast Airlines,* 536 F.2d 975 (1st Cir.), *cert. denied,* 429 U.S. 961 (1976); *Broth. of Railway and Steamship Clerks v. United Air Lines, Inc.,* 325 F.2d 576 (6th Cir. 1963). The federal courts routinely declined to resolve such disputes citing the NMB's exclusive jurisdiction over representation matters.

One such dispute involving the Delta-Western merger came before Justice O'Connor. The Ninth Circuit enjoined the Delta-Western merger less than 24 hours before its consummation. *IBTCHWA, Local Union No. 2707 v.*

Western Air Lines, Inc., 813 F.2d 1359 (9th Cir. March 31, 1987), *vacated and remanded*, 484 U.S. 806 (1987). Justice O'Connor stayed the Ninth Circuit's injunction pending the filing and disposition of a writ of certiorari. Justice O'Connor concluded that the Circuit's decision was contrary to "the great weight of the case law supporting the proposition that disputes as to the effect of collective bargaining agreements on representation in an airline merger situation *are representation disputes within the exclusive jurisdiction of the National Mediation Board*" and that the Circuit's divergence from this principle would likely prompt at least four Justices to vote to grant certiorari. *Western Air Lines v. International Brotherhood of Teamsters*, 480 U.S. 1301, 1305, 1307 (April 2, 1987) (O'Connor, J., in chambers) (emphasis added). Soon after this 1986-87 litigation, the NMB adopted its interim merger procedures, and resolved the representation issues presented by the Delta-Western merger. *Delta Airlines/Western Air Lines*, 14 NMB 291 (1987).

Judicial invalidation of the *Airline Merger Procedures* potentially would raise the issue of the retrospective impact on *Delta/Western* and the 15 other decided merger cases—involving almost 100 NMB representation determinations. Labor relations inertia and the fact that many unions joined in "carrier invocation" of the *Airline Merger Procedures* may, as a practical and legal matter, limit such retrospective challenges.[8] But at a minimum, invalidation of the *Airline Merger Procedures* will cast a cloud of uncertainty over many merger-related representation determinations of the NMB.

The prospective destabilizing impact of the *en banc* decision is even more important. If the *Airline Merger*

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[8] The *amici* are aware of one case, *May et al. v. Shuttle, Inc. et al.*, C.A. No. 94-1019 (SS), in which a collateral challenge to the NMB's *USAir/Shuttle*, 19 NMB 388 (1992) decision is being pursued by a group of former Shuttle employees based upon the *en banc* decision.

Procedures are not available, how will transaction-related disputes concerning union representation be resolved in future mergers? In the absence of Board direction, carriers and unions may be forced to return to the pre-*Merger Procedures* approach, which regularly resulted in unresolved disputes, litigation and potential disruptions of airline operations. *See TWA/Ozark*, 14 NMB at 233.

An even more destabilizing potential outcome of the panel decision would be multiple, minority union representations within a single craft or class on an air carrier, the pattern that the Respondents apparently espouse in the railroad context. If the *en banc* decision stands, a minority union in a merger could avoid having its certification extinguished simply by not invoking the NMB's Section 2 Ninth processes. Where a minority union is merged into a non-union craft or class (as in the *Delta/Western* merger), no labor organization will have any incentive to apply to the Board to terminate the minority union's bargaining rights. When two or more unions have been certified to represent employees in the same craft or class, the *en banc* decision invites the unions to make deals among themselves concerning post-merger preservation of minority union representation. As long as the unions are satisfied with their continued, partial representation and do not make formal application to the NMB, then under the *en banc* decision there would be no procedure to achieve a single representative for each craft or class and the Board, apparently, will be without jurisdiction over this obvious representation dispute.

Such a "balkanization" of airline representation has been expressly and wisely rejected by the Board.[9] In Aircon's and RAA's view such fragmented representation

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[9] "The pattern of representation which has resulted in the railroad industry has, in the Board's judgment led to uneven representation, duplication of effort, and confusion; and has significantly reduced the ability of railroads to integrate operations and manage a single rail system . . . [T]he Board does not intend to foster a similar pattern of representation in the airline industry." *Republic Air Lines/Hughes Air Corp.*, 8 NMB 49, 54-5 (1980).

would produce great labor relations discord and unnecessary litigation, would prevent the operational integration of merged airlines, and would violate the RLA's statutory requirement of systemwide craft or class representation.[10]

II. THE AIRLINE MERGER PROCEDURES DO NOT RESULT IN "CARRIER-INVOKED" REPRESENTATION INVESTIGATIONS.

A central assumption of the *en banc* decision is that the *Railroad Merger Procedures* grant carriers standing to initiate "carrier-invoked" representation investigations despite the asserted absence of statutory authority to do so. In design and application, however, the *Airline* and *Railroad Merger Procedures* are an exercise of the Board's inherent power to determine, *after* a change in the corporate identity or composition of the carrier, the *continued* validity of certifications originally issued in representation proceedings clearly within the Board's jurisdiction. Thus, the lower court erroneously read the merger procedures as creating a "carrier-invoked" procedure, when, in fact, the Board has enforced the *Merger Procedures* as an exercise of the Board's own power to police its prior certifications.[11]

Ironically, the Board first adopted the *TWA/Ozark* interim merger procedures with the express purpose of *limiting, not expanding* carrier influence over merger-related representation issues. The Board found that under

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[10] Section 2 Fourth provides that: "The majority of any craft or class of employees shall have the right to determine who shall be *the representative* of the craft or class. . ." (emphasis added). This singular usage in the statute mandates a single post-merger representative, and provides an express statutory basis for the *Merger Procedures*.

[11] Despite the lower court's ruling, Aircon and the RAA believe that the Board has the authority to permit carriers to invoke representation procedures. *See Brotherhood of Railway and Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 666-67 (1965). Nonetheless, that issue is not necessarily presented under the *Railroad* or *Airline Merger Procedures*.

its prior decision "carriers have interpreted the *Republic* case to give them independent authority to extinguish existing certifications held by organizations on the acquired carrier; to choose between recognition of organizations on its property or the acquired carrier; and to choose whether or not employees on the acquired carrier will be represented." 14 NMB at 233.[12] Thus, in the absence of the merger procedures, carriers, in effect, simply asserted the power to make *de facto* representation decisions.

In reaction, the Board exercised its statutory authority over representation issues by requiring carriers to give the Board notice of mergers and similar corporate transactions concurrent with required filings with other Federal regulatory agencies. *TWA/Ozark*, 14 NMB at 241-2; *Airline Merger Procedures*, 14 NMB at 390-1, Subpart B (1). Indeed, Aircon members, after the public announcement of corporate transactions, have been advised formally through letters from the NMB of their obligation to file under the *Merger Procedures*.[13]

Thus, it is inaccurate to view the *Railroad* or *Airline Merger Procedures* as giving carriers standing to present representation disputes to the Board—the central reason the *en banc* court found that the *Railroad Merger Procedures* exceeded the NMB's statutory authority. Rather, the Board has mandated that carriers give the Board

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[12] The *TWA/Ozark* decision was plainly intended by the Board to assist incumbent unions' interests in corporate transactions. Airline unions have sought aggressively to have the Board take jurisdiction and resolve "single carrier" issues presented by corporate relations between carriers. *See, e.g., Continental Airlines/ Continental Express*, 20 NMB 326 (1993); *Flagship Airlines, Inc.*, 20 NMB 139 (1993); *Henson Aviation, Inc.*, 18 NMB 441 (1991); *Precision Valley Aviation*, 18 NMB 486 (1991); *Eastern Airlines, Inc.*, 17 NMB 432 (1990).

[13] This Board-imposed filing requirement has a statutory basis in Section 2 Ninth, 45 U.S.C. § 152 Ninth, which provides: "The Board shall have access to and have power to make copies of the books and records of the carrier to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

notice of corporate transactions, so that the Board may *sua sponte* investigate and determine the effect, if any, on previously issued certifications. Any legal analysis of the Board's authority to issue and apply the *Merger Procedures* must be premised upon the accurate characterization of those procedures as an assertion of the Board's authority to determine the continued validity of its certifications.

III. THE RLA GRANTS THE BOARD AUTHORITY TO REVIEW THE CONTINUED VALIDITY OF BOARD-ISSUED CERTIFICATIONS WHEN CORPORATE TRANSACTIONS CHANGE THE IDENTITY OR COMPOSITION OF THE CARRIER FOR WHICH THE CERTIFICATION WAS ISSUED.

The Board's jurisdiction to determine the post-merger validity of its previously-issued representation certifications, after a change in the carrier's corporate identity, is necessarily implied under Sections 2 Ninth and 2 Fourth of the Railway Labor Act. The *en banc* court's legal analysis is incorrect because it ignores both the Board's statutory authority to determine *who is the carrier* for representation purposes and the fact that corporate transactions invariably present the issue of which *existing certifications* are applicable to a post-merger carrier.

Section 2 Ninth of the Act is carrier-specific: it deals with disputes "among a carrier's employees" and requires the Board to certify representatives "to the carrier." That provision gives the Board the authority to determine, as an initial matter in representation disputes, whether an entity is a "carrier" under the Act's definitions, and then issue a carrier-specific certification to a union. *See, e.g., Delpro Co. v. Brotherhood of Railway Carmen*, 519 F. Supp. 842 (D. Del. 1981), *aff'd*, 676 F.2d 960 (3d Cir. 1982), *cert. denied*, 459 U.S. 989 (1983).

The Board's statutory authority for the *Merger Procedures* is not based upon a new representation application from a group of employees, but rather, is derivative of the Board's authority to issue the original, carrier-specific

certifications which are affected by the corporate transaction.[14] As the Board has correctly concluded, "the creation, change, and the termination of representation rights are within the province of the Board under the Railway Labor Act." *Airline Merger Procedures,* 14 NMB at 389. Mergers present the question of whether Board-issued, carrier-specific certifications are still valid under the Section 2 Fourth requirement of systemwide representation, and the Board has concluded that it has the authority under Section 2 Ninth to resolve such issues.

The courts have clearly and consistently held that the NMB has exclusive jurisdiction of representation disputes and that the courts have no jurisdiction to adjudicate the continued validity of Board-issued certifications. *See Switchmen's Union of North America v. NMB,* 320 U.S. 297 (1943).[15] The Respondents' ultimate argument, adopted by the D.C. Circuit, is that the NMB has no jurisdiction to modify or terminate its own certifications, *unless* a union invokes the representation procedures with a new dispute. But, the Railway Labor Act provides no

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[14] The Board's authority in this area is analogous to that of any administrative agency to retain jurisdiction over a matter after initial resolution. *See, e.g., Penn Central Merger Cases,* 389 U.S. 486, 501, 521 (1968).

[15] As Petitioners BN and NRLC have noted, the *en banc* decision's conclusion otherwise is in conflict with a decision of the Sixth Circuit upholding the *Railroad Merger Procedures. See Brotherhood of Maintenance of Way Employees v. Grand Trunk Western Railroad,* 961 F.2d 1245 (6th Cir. 1992); BN Petition at 23-25; NLRC Petition at 17-18. Moreover, the *en banc* decision is inconsistent with the D.C. Circuit's own prior decisions—including a decision by Judge Edwards, author of the *en banc* decision—giving effect to NMB actions changing, amending or terminating previously-issued certifications. *See International Longshoremen's Ass'n v. NMB,* 870 F.2d 733 (D.C. Cir. 1989) (reviewing and remanding to the Board a case in which the NMB *sua sponte* terminated previously issued certification); *Association of Flight Attendants, AFL-CIO v. USAir, Inc.,* 24 F.3d 1432 (D.C. Cir. 1994) (Edwards, J.) (determining contractual impact of NMB termination of certifications in *USAir/Shuttle,* 19 NMB 388 (1992)).

basis for concluding that the certified union should have the unilateral power to determine the continued validity of its own "license" to represent employees.[16]

The ultimate result of Respondents' position and the *en banc* decision is that the Board would have the power only to issue certifications, and no statutory authority to determine that a certification is no longer valid, *even when the carrier for whom it was issued has merged with another carrier or no longer exists.* That truncation of Board authority makes no sense as a matter of national labor policy, and there is no basis for the Court to find that Congress intended such a limitation on the NMB's authority under Section 2 Ninth.

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[16] A Board-issued certification is a "license" to represent certain employees of a carrier, and the Board's role is analogous to a licensing agency. At common law, a licensing agency's authority to issue licenses implicitly includes the authority to revoke the licenses. *See,* 51 Am. Jur. 2d § 58 Licenses and Permits; 53 C.J.S. § 51 Licenses; *Mounts v. Chafin,* 411 S.E.2d 481, 487 (W.Va. 1991); *Woodbury v. Municipal Council of Gloucester,* 61 N.E.2d 647 (Mass. 1945); *Butcher v. Maybury,* 8 F.2d 155 (W.D.Wash. 1925).

CONCLUSION

The Court should grant review to determine whether Congress' intent to make the Board the sole arbiter of representation disputes under the Act includes Board authority to continue, modify, or terminate those certifications when the carrier's identity or composition is changed through a corporate transaction. Because that interpretation does no violence to the express language of Section 2 Ninth, and is consistent with the long-recognized exclusive Board jurisdiction of representation disputes, upon review the Court should reverse the 5 to 4 *en banc* decision of the D.C. Circuit.

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Nos. 94-890 and 94-907

In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL RAILWAY LABOR CONFERENCE, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

BURLINGTON NORTHERN RAILWAY COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Mediation Board's railroad merger procedures were subject to judicial review.

2. If so, whether the court of appeals erred in holding that certain provisions in the merger procedures violated the Railway Labor Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-890

NATIONAL RAILWAY LABOR CONFERENCE; PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

No. 94-907

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-52a)[1] is reported at 29 F.3d 655. The vacated panel opinion (Pet. App. 54a-80a) is reported at 988 F.2d 133.

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[1] "Pet. App." refers to the appendix filed with the petition in No. 94-890.

The decision of the district court in No. 94-890 (Pet. App. 81a-87a) is unreported. The order of the district court in No. 94-907 (Pet. App. 103a-106a) is unreported. The decision of the National Mediation Board under review in No. 94-907 (Pet. App. 107a-130a) is reported at 18 N.M.B. 240.

JURISDICTION

The judgment of the court of appeals following rehearing en banc was entered on July 19, 1994. On October 11 and October 12, 1994, the Chief Justice issued orders extending the time for filing petitions for writs of certiorari to and including November 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The primary purpose of the Railway Labor Act (the Act), 45 U.S.C. 151 *et seq.*, is to facilitate the resolution of labor-management disputes in the rail and air transportation industries, and thereby to "avoid[] * * * industrial strife, by conference between the authorized representatives of employer and employee." *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 547 (1937); see 45 U.S.C. 151a. To that end, the Act requires that carriers, their employees, and unions "exert every reasonable effort to make and maintain agreements * * * and to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier." 45 U.S.C. 152 First.

Under the Act, employees are guaranteed "the right to organize and bargain collectively through representatives of their own choosing," 45 U.S.C. 152 Fourth, the majority of any "craft or class of employees" who work for a particular carrier have the right to select a single

representative to serve as their exclusive bargaining agent, *ibid.*; 45 U.S.C. 152 Second; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961), and the carrier must negotiate, or "treat," with that representative to settle labor disputes, 45 U.S.C. 152 First and Ninth; *Virginian Ry.*, 300 U.S. at 548.

Section 2 Ninth, of the Act (45 U.S.C. 152 Ninth) plays a further and critical role in the statutory scheme by "set[ting] up the machinery" for selecting and certifying employee representatives, *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees* (*Railway Clerks*), 380 U.S. 650, 658 (1965), and by providing a mechanism for the resolution of disputes among the employees of a craft or class regarding the identity of their bargaining representative: Upon the request of any party to such a dispute, the National Mediation Board is obligated to conduct an investigation, and to determine and certify to both parties to the dispute, and to the carrier, the identity of the employees' representative.[2] The legal and

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[2] Section 2 Ninth provides in relevant part as follows:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the * * * Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties * * * the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carriers. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. * * * The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be

factual determinations made by the Board in its resolution of such a representation dispute are, as a rule, not subject to judicial review. *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 300 (1943). Board actions are reviewable, however, if taken "in excess of its delegated powers and contrary to a *specific prohibition in the Act.*" *Railway Clerks*, 380 U.S. at 660 (quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)); see also *International Bhd. of Teamsters* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir.) (review of Board action available in "instances of constitutional dimension or gross violation of the statute"), cert. denied, 393 U.S. 848 (1968).

2. This case arose from the Board's attempt to address unique representational problems created by the merger of carriers in the airline and railroad industries. Because the employees of each carrier have their own bargaining representatives, when two or more carriers merge it will often be unclear who represents the crafts and classes of the resulting entity. It could be the representative of the employees who had worked on the surviving carrier's lines, or it could be the representative of the employees who had worked on the non-surviving carrier's lines. Often each representative asserts that it retains its certification with respect to the employees that work on its previously distinct lines. The confusion that arises regarding the identity of the authorized representative, as well as the accretion of multiple representations, poses significant practical problems that can frustrate the negotiation of collective bargaining agreements and hinder day-to-day labor-

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deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. 152 Ninth.

management relationships. See Pet. App. 91a-95a, 121a-122a.

The Board first addressed the representation problems that attend carrier mergers in the context of the airline industry, but its analysis was equally applicable to, and reflected the Board's substantial experience with, railroad mergers. In *Republic Airlines & Hughes Air Corp.*, 8 N.M.B. 49 (1980), the Board noted that railroad mergers had produced "uneven representation, duplication of effort, and confusion," and had "significantly reduced the ability of railroads to integrate operations and manage a single rail system." *Id.* at 54-55. In light of those difficulties, and the "inherent inefficiency" in maintaining multiple carrier systems solely for representation purposes, the Board held that the representation certifications on the acquired airline, Hughes Air Corporation, were extinguished "by operation of law" upon Hughes's acquisition by Republic Airlines. *Id.* at 56.

In practice, however, the *Republic Airlines* approach did not sufficiently stabilize labor relations, and it posed difficulties for employees and unions. See *TWA/Ozark Airlines*, 14 N.M.B. 218 (1987). Concluding that automatic extinguishment of certifications was "inadequate to provide for a fair and orderly resolution of representation matters put into flux by a merger," *id.* at 241, the Board promulgated interim procedures under which airline carriers involved in a merger, acquisition, or consolidation were permitted to petition the Board to determine the post-merger status of any certifications previously issued by the Board. Carriers were directed to provide notice to the Board of an impending merger at the time they applied to the Department of Transportation for permission to merge, or as soon as possible thereafter. *Id.* at 242-243. Those interim procedures

were later adopted on a permanent basis. See *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 N.M.B. 388 (1987).

In 1989, the Board proposed for the railroad industry merger procedures resembling those that it had adopted for the airline industry. Following a comment period, the Board issued its *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry*, 17 N.M.B. 44 (1989) (Merger Procedures) (reproduced at Pet. App. 90a-102a). The Board explained that prompt resolution of representation disputes connected with railroad mergers was necessary to effectuate the Board's "statutory mandate to certify only unions that represent the majority of a system-wide class of employees." *Id.* at 92a. Under the Merger Procedures, carriers are required to notify the Board of expected mergers, whereupon the Board undertakes to determine whether the merged carriers would operate as a single transportation system, and then to determine the status of outstanding certifications on the merged carrier. Pet. App. 96a, 99a. Incumbent unions on the affected carriers may comment concerning the carrier's submissions and other pertinent matters. *Id.* at 100a. The incumbent unions may also avail themselves of a simplified procedure for applying to represent employees on the full system. *Id.* at 97a-98a.

3. On December 8, 1989, the non-federal respondents filed suit against the Board in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief concerning the Merger Procedures. C.A. App. 9. The complaint in that action (No. 94-890) alleged that the Merger Procedures violated the Railway Labor Act, 45 U.S.C. 152 Ninth, and the

Administrative Procedure Act (APA), 5 U.S.C. 551, 553, because they permit persons other than employees or their representatives to invoke the services of the Board.[3] Petitioners, the National Railway Labor Conference and Burlington Northern Railroad Company (Burlington Northern), intervened as defendants.

The district court dismissed the challenge to the Merger Procedures for lack of jurisdiction, on the ground that neither the "face of the pleadings" nor a "peek at the merits" disclosed an error of constitutional dimension or a "gross violation" of the Railway Labor Act. Pet. App. 84a-85a (quoting *International Ass'n of Machinists* v. *TWA*, 839 F.2d 809, 811, amended, 848 F.2d 232 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988), and *Professional Cabin Crew Ass'n* v. *National Mediation Bd.*, 872 F.2d 456, 459 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989)). The court found that Section 2 Ninth of the Act does not "impose a clear and mandatory duty on the Board to refrain from investigating in the wake of a carrier's request." Pet. App. 86a. The court noted in that respect that the Act does not state that the Board may determine and certify collective bargaining representatives *only* if an employee or representative requests its intervention. *Ibid.*

4. On June 14, 1989, Burlington Northern filed a petition with the Board requesting the Board to resolve several representation disputes that had resulted from the mergers between 1970 and 1985 of several railroads into Burlington Northern. C.A. App. 70. The petition

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[3] The complaint also alleged that the Merger Procedures violated the Board's own procedures, see 29 C.F.R. Pt. 1203, as well as the Due Process Clause of the Fifth Amendment. The district court rejected those claims, Pet. App. 81a, 86a n.3, and respondents did not appeal the dismissal of those claims.

alleged that although Burlington Northern operated as a single transportation system, "labor organizations representing employees who work under collective bargaining agreements have attempted to maintain a fragmented representational scheme and promoted minority representation." *Id.* at 73.

The Board's investigation revealed that the merger of 11 railroads into Burlington Northern had resulted in the existence of 85 certifications with respect to railroads that no longer existed. Pet. App. 109a. After determining that it had jurisdiction to entertain Burlington Northern's application, *id.* at 116a-120a, the Board found that a single transportation system existed on the Burlington Northern for purposes of the Railway Labor Act. *Id.* at 122a. Applying its "longstanding practice * * * to certify only unions that represent the majority of a system-wide craft or class of employees," *id.* at 123a, the Board extinguished all certifications on the predecessor railroads, effective as of the date of its decision, *id.* at 123a-124a. The Board then determined which unions represented the system-wide crafts or classes on the Burlington Northern. Pet. App. 124a-129a.

On May 16, 1991, the non-federal respondents brought an action in the United States District Court for the District of Columbia, challenging the Board's *Burlington Northern* decision. On September 12, 1991, the district court granted the Board's motion to dismiss that case (at issue in Burlington Northern's petition in No. 94-907) on the same grounds expressed in its earlier opinion rejecting respondents' facial challenge to the Merger Procedures. Pet. App. 105a.

5. The district court decisions were consolidated and reversed on appeal. Pet. App. 54a-80a. The Board sought and was granted rehearing en banc, but after rebriefing

and reargument, the court again reversed, in a 5-4 decision. *Id.* at 1a-52a, 53a. The court concluded that the Merger Procedures were subject to judicial review under *Leedom* v. *Kyne*, *supra*, because the Procedures constituted a "gross violation" of the Railway Labor Act. Pet. App. 10a. In the court's view, the nonreviewability rule of *Switchmen's Union* was designed only to protect the Board in the exercise of its circumscribed role under Section 2 Ninth—to investigate and resolve certification disputes brought to its attention by employees—and outside those confines the nonreviewability rule has no application at all. Pet. App. 7a-12a. The court also adopted the view taken by Judge Randolph (in a concurrence joined by all members of the majority) that the APA permits, and *Switchmen's Union* does not proscribe, judicial review of the Board's actions when the Board acts through APA-type rulemaking procedures. *Id.* at 4a n.1, 31a-34a.

Turning to the merits, the court of appeals found no support in the text of Section 2 Ninth for the Board's asserted authority to investigate and resolve representation issues in the absence of an employee request. Pet. App. 16a-21a. The court rejected the "suggestion that [the Board] possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area," noting that "[a]gencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature." *Id.* at 28a-29a. The court found, in addition, that the legislative history and prior Board interpretations of the Act cut against the Board's position that it may resolve representation issues in the absence of a request by employees or their representatives. *Id.* at 21a-28a. The court then remanded respondents' challenge to the Merger Procedures for entry of

declaratory and injunctive relief, and remanded respondents' challenge to the Board's *Burlington Northern* decision for reconsideration in light of the court's analysis of the Merger Procedures. *Id.* at 30a.

Judge Williams, joined by three other judges in dissent, disagreed both with the majority's application of the nonreviewability doctrine and with the majority's view that the Board's initiation of certification procedures under the Merger Procedures exceeded the Board's statutory authority. See Pet. App. 35a-52a. Judge Williams saw in *Switchmen's Union* no basis for distinguishing between the Board's resolution of a particular representational dispute—which is not subject to judicial review—and the Board's determination of what disputes it is authorized to resolve—which, under the majority's analysis, is subject to review. *Id.* at 40a-42a. He also saw no justification in *Switchmen's Union* for distinguishing for purposes of reviewability between the Board's exercise of authority in an adjudication and its promulgation of rules of general application. In Judge Williams' view, such a distinction, made by the concurrence (and adopted by the majority), will merely dispose the Board against the use of notice-and-comment rulemaking procedures. *Id.* at 36a-39a. On the merits, the dissent found nothing in the text, history or underlying purposes of the Railway Labor Act to preclude the Board from undertaking to resolve certification issues in circumstances other than those (*i.e.*, upon the request of an employee or employee representative) in which the Board is affirmatively required by Section 2 Ninth to act. *Id.* at 45a-52a.

ARGUMENT

1. To the extent that the court of appeals relied on *Leedom* v. *Kyne*, *supra*, in determining that it had

jurisdiction to review the validity of the Merger Procedures, the mode of analysis it employed is consistent with this Court's teaching. The court of appeals acknowledged the highly deferential standard of review accorded decisions of the Board, and it recognized that Board actions can be reviewed and reversed only in the most extraordinary of circumstances. See Pet. App. 10a (acknowledging that "[j]udicial review of [Board] decisions is one of the narrowest known to the law," and that "'courts have no authority to review [Board] certification decisions in the absence of . . . a gross violation of the Railway Labor Act'").[4] Although the Board does not agree with the court's conclusion that provisions in the Merger Procedures that permit the Board to initiate a representation investigation violate the Act—grossly or otherwise—that disagreement does not warrant this Court's review. We have been informed by the Board that it is considering alternative ways to address the representational problems that arise from carrier mergers and consolidations.

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[4] The court of appeals stated that this case did not involve a review of the merits of a particular certification decision, but involves instead an analysis of the threshold question whether the Board "ha[d] * * * jurisdiction to act at all." Pet. App. 10a. Although the court noted that some other courts of appeals have held that questions respecting the Board's authority to act fall categorically outside of *Switchmen's Union*'s proscription against review, *id.* at 13a, the court recognized that "it may not always be a simple task to distinguish between Board actions which implicate the Board's threshold jurisdiction and those which are simply an erroneous exercise of functions legitimately entrusted to the Board's discretion," *id.* at 14a. The court found no need to resolve whether jurisdictional questions invariably merit a different standard of review, however, because it concluded that the Board's action in this case was reviewable even under the restrictive standard employed in *Leedom* v. *Kyne*, *supra*. Pet. App. 15a.

Moreover, the basis of petitioners' legal argument in this Court is that although Section 2 Ninth of the Act imposes a duty on the Board to resolve a representational dispute when requested to do so by one of the employees (or employee representatives) who is a party to the dispute, it does not preclude the Board from addressing representational issues in other circumstances if the Board elects to do so. 94-890 Pet. 19-21; 94-907 Pet. 27-28. Petitioners do not argue that the Act confers on them a right, which the court of appeals has now abrogated, to have the Board address representational issues in the merger context in the absence of a request to do so by an employee or employee representative who is involved in a dispute.

2. The court of appeals also endorsed the concurrence's view that *Switchmen's Union* does not apply when the Board acts through APA-like rulemaking procedures. Although the Board believes, for the reasons stated by the dissent, that *Switchmen's Union* applies irrespective of whether the Board acts through rulemaking or adjudication, the decision below is of limited applicability because the Board rarely acts through formal rulemaking processes.

It is significant, in that respect, that the court of appeals ruled definitively only with respect to respondents' facial challenge to the Merger Procedures. The court did not overturn the Board's *Burlington Northern* decision (at issue in No. 94-907), in which the Board actually adjudicated a representational dispute in accordance with the Merger Procedures; instead, the court remanded respondents' challenge to that decision to the district court for further consideration. It is unclear how, under the court of appeals' analysis, the district court is expected to rule on respondents' challenge to the Board's application of the Merger

Procedures in the context of representational issues involving a particular carrier. Until the district court rules on the matter, issues respecting the Board's *application* of the Merger Procedures will not be presented clearly for review.

3. Finally, there are no conflicts among the courts of appeals on any of the issues presented by these cases. Neither the railroad Merger Procedures nor the airline merger procedures have been facially challenged in any other circuit. Contrary to petitioners' assertions (94-890 Pet. 17-18; 94-907 Pet. 23-25), the Sixth Circuit's decision in *Brotherhood of Maintenance of Way Employees* v. *Grand Trunk Western R.R.*, 961 F.2d 1245 (1992), does not conflict with the decision below. To the contrary, the Sixth Circuit relied upon District of Columbia Circuit precedent in concluding that judicial review of National Mediation Board decisions is quite limited. See 961 F.2d at 1249. And although *Grand Trunk Western Railroad* also involved an application of the Merger Procedures, the parties in that case did not contest, and the court did not consider, the Board's authority to act to resolve a representational dispute when the Board's jurisdiction has not been invoked by an employee or an employee representative who is a party to the dispute—the key question on the merits in this case.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1994

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals District Of Columbia Circuit

REPLY BRIEF OF BURLINGTON NORTHERN RAILROAD COMPANY

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No. 94-907

In The

Supreme Court of the United States

October Term, 1994

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

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RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals District Of Columbia Circuit

REPLY BRIEF OF BURLINGTON NORTHERN RAILROAD COMPANY

The Solicitor General for the National Mediation Board ("NMB or Board") has asked this Court to deny the Petition for Writ of *Certiorari* filed by Burlington Northern Railroad Company ("BN").[1] The arguments presented

[1] The Solicitor General has similarly asked that the Court deny the Petition filed by the National Railway Labor Conference.

do not support denial of the Writ of *Certiorari*. *See* Opposition at 10-13. Because there is no other opposition to BN's Petition,[2] this Court should grant the Petition.

1. The principal argument presented by the Solicitor General is that though the divided *en banc* court of appeals was wrong in holding that the NMB's *Merger Procedures* violated the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, this Court should not grant the Petition because the Board is contemplating "alternative ways to address" merger-related representation disputes. Opposition at 11. This argument presents a conundrum. Without any specificity about the "alternative ways" and without any public pronouncement by the Board stating that it was exploring such "alternative ways" and describing them, we are left with an indefinite delay to the resolution of an important representation dispute and with an erroneous court of appeals' decision adversely affecting the proper administration of the RLA. This argument thus runs headlong into previous representations by the Board and the Justice Department and thus should be afforded little weight.

Earlier in this case, Justice forcefully argued that this case "is of great legal significance" and has many adverse practical effects. Petition for Rehearing with Suggestions for Rehearing En Banc of the National Mediation Board at 3. Those practical problems were that the 2-1 court of appeals' panel decision "unsettles numerous bargaining relationships . . . in the railroad industry since . . . 1989

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[2] The labor organizations which are the plaintiffs below have waived their right to respond.

and . . . in the airline industry . . . since 1987." NMB Rehearing Petition at 3. While the NMB *Merger Procedures* "promote stability in labor relations (citation omitted)," the divided panel decision finding that the *Merger Procedures* violated the RLA "require[d] the return to certifications which are **necessarily** inconsistent with the right of . . . the employees to determine their representatives." NMB Rehearing Petition at 3-4. The significance of this case and practical problems resulting from the *Merger Procedures* being struck down have been only exacerbated by the 5-4 D.C. Circuit's *en banc* decision. These unspecified "alternative ways" provide little comfort for the entire airline and rail industries that must face the destabilizing labor relations problems created by an erroneous court of appeals' decision. Opposition at 11. Not only are these illusive alternatives an insufficient reason to deny BN's Petition but they also fly in the face of the earlier positions argued by Justice. The divided *en banc* D.C. Circuit's decision leaves the airline and rail industries subject to potential disruptions to interstate commerce and meaningless collective bargaining. In particular, BN, along with the rest of the rail industry, is locked in a battle with certain labor organizations over who is the representative for collective bargaining for a particular craft on each railroad and that dispute has stalled the current round of bargaining. The court of appeals' decision can only result in further litigation and the prospect of interruptions to commerce. The position of the Solicitor General would leave the parties and the public in such an intolerable position.

2. Although the Solicitor General disagrees with the *en banc* court of appeals' decision that the *Merger Procedures* violate the RLA, there is no substantive legal justification given as to why this Court's review is not warranted. Opposition at 11. The Solicitor General offers no basis for this Court to conclude that the Board's consideration of "alternative ways" provide a legally sustainable way out of the difficulties created by the 5-4 D.C. Circuit's decision.[3] Without such assurance, the "alternative ways" would only face additional challenge by the labor organizations. Representation disputes would once again be dragged through "other tribunals of law"; "the haggling and delays of litigation" would not be avoided. *Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 671 (1965) (*"Railway Clerks"*); *Switchmen's Union of N. Am. v. National Mediation Bd.*, 320 U.S. 297, 305 (1943) (*"Switchmen's Union"*). Only this Court's review would bring an end to the delay.

3. The Solicitor General tries to diminish the conflict between the sharply divided *en banc* D.C. Circuit's decision on reviewability of the Board's representation procedures and this Court's decisions on a lack of judicial review. Opposition at 11-12. But in so doing, the Solicitor

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[3] It is not a legally sufficient basis for the Solicitor General to imply that because BN does not argue that there is a right under the RLA for a carrier to invoke the Board's services under § 2 Ninth, that the Board's "alternative ways" may solve the issue presented here. Opposition at 12. The Solicitor General flatly misses the issue. It is not whether the carrier has a right to invoke the Board's services under § 2 Ninth, but whether the Board has the discretion to investigate under § 2 Ninth a certification if the employees have not invoked the Board's services.

General highlights the reason for this Court's consideration. Though the decisional law was largely static and predictable with respect to a lack of involvement by the courts in the Board's handling of representation matters, the 5-4 D.C. Circuit's decision turns that law topsy-turvy and encourages more court involvement. Confusion now will exist as to the appropriate standard of judicial review for the Board's representation procedures. Indeed, the Solicitor General's view of the divided D.C. Circuit's decision creates further confusion: "[t]o the extent that the court of appeals relied upon *Leedom v. Kyne* . . . " Opposition at 10. That statement does not offer much reassurance as to what standard of judicial review the court of appeals used to overturn the Board's representation procedures. Further, this Court's decisions in *Switchmen's Union* and *Railway Clerks* have long governed the lack of judicial review of the Board's handling of representation matters. The sharply-divided court of appeals' decision allows the lower courts to select the level of scrutiny that a particular court wishes to employ: the court could chose either 1) *Leedom v. Kyne*, 358 U.S. 184 (1958), or 2) Administrative Procedures Act, 5 U.S.C. § 704 (1988), or 3) the "no judicial review standard" of *Switchmens' Union* and *Railway Clerks*. This Court's grant of the Writ of *Certiorari* could ensure predictability as to the standard of judicial review. That predictability would discourage the parties from undertaking what surely will be a new round of litigation that tests the Board's treatment of representation matters. This is precisely the opposite of the result intended by Congress. *See Railway Clerks*, 380 U.S. at 671.

4. Finally, the Sixth Circuit's decision in *Brotherhood of Maintenance of Way Employes v. Grand Trunk Western Railroad*, 961 F.2d 1245 (6th Cir. 1992), conflicts with the 5-4 *en banc* D.C. Circuit's decision, notwithstanding the views of the Solicitor General. The Sixth Circuit was told that Grand Trunk both petitioned the Board under the *Merger Procedures* for resolution of merger-related representation disputes, and sought clarification from the Board over its decision resolving such disputes. 961 F.2d at 1249. The court of appeals delayed making a decision until the Board acted upon the Grand Trunk's clarification request. 961 F.2d at 1249. After receiving the Board's clarification, the court stated, "we conclude that the Board correctly determined that the matter presented to it in this case [by Grand Trunk] was a representation dispute . . . . " 961 F.2d at 1250. The Sixth Circuit's decision stands in stark contrast to the divided D.C. Circuit's decision here: "The inescapable conclusion from the plain language of Section 2 Ninth, therefore, is that Congress intended neither carriers nor the Board to initiate representation proceedings." BN's Petition App. at 24a. Only this Court's grant of the Writ of *Certiorari* can resolve the conflict.

CONCLUSION

Notwithstanding the views of the Solicitor General, for the reasons set forth above and in the Petition, the Writ of *Certiorari* should issue and the decision of the *en banc* United States Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted,

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